TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
APPELLANT,

vs.

CITY OF BIRMINGHAM, A MUNICIPAL CORPORATION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

FILED NOVEMBER 24, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
APPELLANT,

vs.

CITY OF BIRMINGHAM, A MUNICIPAL CORPORATION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

INDEX.

	Original	Print
Record from Supreme Court of Michigan	1	1
Docket entries	1	1
Petition for writ of mandamus	2	2
Exhibit "A"—Special assessment street improvement bond of the Village of Birmingham, dated October 1, 1928	10	8
Exhibit "B"—Demand by Municipal Investors Association on the Village of Birmingham for reassessment sufficient to retire special assessment street improvement bonds, dated January 20, 1941	11	10
Exhibit "C"—Excerpt from Birmingham City Commission proceedings showing adoption of resolution denying demand of Municipal Investors Association	12	11
Order to show cause	13	11
Answer of City of Birmingham, et al., to petition for writ of mandamus	14	12
Answer and petition of Attorney General, intervening to protect the rights and interests of the State of Michigan	17	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1942.

—8464

	Original	Print
Record from Supreme Court of Michigan—Continued		
Reply of plaintiff	23	17
Opinion of the Court, Chandler, J.	26	18
Concurring opinion of Sharpe, C. J.	32	26
Order denying writ of mandamus	35	28
Petition for appeal	36	28
Order of Chief Justice of Supreme Court of Michigan denying application for appeal	40	31
Order allowing appeal	41	31
Assignment of errors	43	32
Cost bond (omitted in printing)	67	
Citation (omitted in printing)	71	
Praecipe for record	75	35
Clerk's certificate (omitted in printing)	77	
Statement of points and designation of record to be printed	78	37
Order postponing consideration of jurisdiction until hearing on the merits	80	37

[fol. 1] **IN SUPREME COURT OF MICHIGAN**

No. 41532

MUNICIPAL INVESTORS ASSOCIATION, a Michigan Corporation,
Plaintiff,

vs.

CITY OF BIRMINGHAM, et al., Defendants

Mandamus

DOCKET ENTRIES

1941.

Feb. 7. Petition filed.
" 7. Brief in opposition filed.
" 7. Order to show cause allowed.
" 8. Order to show cause issued returnable forthwith.
" 10. Answer filed.
Mar. 12. Note of argument filed.
Apr. 15. Argued and submitted.
May 9. Intervening answer filed by State.
" 23. Reply filed.
June 30. Writ denied, no costs.
Sept. 24. Petition for appeal to Supreme Court of U. S. filed.
" 24. Petition for appeal to Supreme Court of U. S. denied.

[fol. 2] IN SUPREME COURT OF MICHIGAN

Calendar No. 41532

MUNICIPAL INVESTORS ASSOCIATION, a Michigan Corporation, Plaintiff,

vs.

CITY OF BIRMINGHAM, a Municipal Corporation; THE COMMISSION OF THE CITY OF BIRMINGHAM and John E. Martz (Mayor), and Ray A. Palmer, William C. Allee, Ralph I. Coryell, Luther Heacock, Harry Bissett and Wilmer E. Moody (Commissioners), Members of the Commission of the City of Birmingham, and Elmer W. Haack, Assessor of the City of Birmingham, and Their Respective Successors in Office, Defendants.

PETITION FOR WRIT OF MANDAMUS—Filed February 7, 1941

The plaintiff shows unto the Court as follows:

I

That the plaintiff, Municipal Investors Association, is a corporation organized and existing under the laws of the State of Michigan, with its principal office in the City of Detroit, Michigan, and that it is the holder of certain bonds hereinafter described.

II

That the defendant, City of Birmingham, is a municipal corporation organized and existing under and by virtue of the Constitution and Statutes of the State of Michigan, particularly Act No. 279 of the Public Acts of 1909, as amended, [fol. 3] and a charter adopted by the electors of said city on April 3, 1933; that John E. Martz is Mayor of said city and Ray A. Palmer, William C. Allee, Ralph I. Coryell, Luther Heacock, Harry Bissett and Wilmer E. Moody are Commissioners of said city, and that said Mayor and Commissioners constitute the City Commission which is the legislative and governing body of said city; that Elmer W. Haack is Assessor of said city.

III

That the defendant, City of Birmingham, is successor to the Village of Birmingham by reason of the reincorporation of the former Village of Birmingham as a city in 1933, pursuant to the provisions of Act No. 279 of the Public Acts of 1909, as amended; that pursuant to said act and its city charter, the City of Birmingham upon such reincorporation assumed all of the debts and liabilities of such village.

IV

That the said Village of Birmingham, from November 7, 1917 until it was incorporated as the City of Birmingham, was operating under the provisions of Act No. 278 of the Public Acts of 1909, as amended, and a village charter adopted by the electors of said village on the 25th day of October, 1917, as subsequently amended.

V

That in the year 1928, pursuant to the provisions of its charter, the Village of Birmingham took proceedings for the paving of Washington Boulevard from Clawson Road to Lincoln Avenue, Northlawn Drive from Washington to Dorchester, and Southlawn Drive from Bates to Dorchester and for the assessment of 23.4% of the cost thereof, or $5,419.90, to the village at large, and 76.6% of such cost, or $17,742.10, to Special Assessment District No. 146, constituted of the property abutting upon those portions to be improved of said highways. The several amounts as- [fol. 4] sessed against the property in said special assessment district were made payable in five (5) equal annual installments, the first installment becoming due in 1928.

VI

That pursuant to the authority granted in said charter, the Village of Birmingham issued bonds in anticipation of the collection of the special assessments against the property in said Special Assessment District No. 146, numbered 1 to 17, both inclusive, in the denomination of $1000 each, aggregating the principal sum of $17,000, dated October 1, 1928, bearing interest at the rate of 5¼% per annum, and

maturing as follows: $4000 on October 1, 1929, $3000 on October 1, 1930, $4000 on October 1, 1931, $3000 on October 1, 1932 and $3000 on October 1, 1933; that attached hereto, marked Exhibit "A" and made a part hereof is a copy of bond No. 12 of said issue and that all other bonds of said issue were of like tenor except as to number and maturity date. That at the time of the issuance of said bonds, Section 22 of Chapter XX of the village charter contained the following provision relative to special assessment bonds, to-wit:

"Such bonds shall draw interest not exceeding six per cent per annum, as the commission may determine, and shall be payable out of the special assessment district fund when the assessment is collected."

VII

That bonds Nos. 8 to 11, both inclusive, which matured on October 1, 1931, were refunded by refunding bonds Nos. 1 to 4, both inclusive, in the denomination of $1000 each, aggregating the principal sum of $4,000.00, dated October 1, 1931, bearing interest at the rate of 5¼% per annum and maturing $1000 on the 1st day of October of each of the years 1932 to 1935, both inclusive.

VIII

That bonds Nos. 12 to 17, both inclusive, of said original issue are still outstanding, and that bonds Nos. 1, 2 and 4 [fol. 5] of said Refunding issue are still outstanding; that there has been paid upon the principal of each of said original and refunding bonds the sum of $100.00, leaving $900.00 as the balance due upon the principal of each of said bonds, or a total of $8,100; that said principal payment of $100.00 was made upon the bonds of the original issue on June 19, 1939 and upon the bonds of the refunding issue on November 28, 1939; that interest is due upon said original bonds Nos. 12, 13 and 14 from October 1, 1932 and upon said original bonds Nos. 15, 16 and 17 from October 1, 1933, and that interest is due upon said refunding bonds Nos. 1, 2 and 4 from October 1, 1932; that the total amount of said accrued interest to January 1, 1941 is $3,675.23, making the total amount now due on outstanding bonds against said district, in excess of $11,800.00.

IX

That the plaintiff is the holder of said bonds Nos. 12 to 17, both inclusive, of said original issue with an aggregate principal balance due thereon of $5,400 and with interest as follows:

Bonds Nos. 12, 13 and 14—5¼% per annum on $1000.00 from October 1, 1932 to June 19, 1939 and on $900.00 thereafter until paid.

Bonds Nos. 15, 16 and 17—5¼% per annum on $1000.00 from October 1, 1933 to June 19, 1939 and on $900.00 thereafter until paid.

X

That the charters of both the Village of Birmingham and the City of Birmingham provide for the transfer of installments of special assessments becoming delinquent to the next municipal annual tax roll and for their collection thereafter in the same manner as municipal taxes. Said charters also provide for the return of municipal taxes to the County Treasurer in the same manner as county and school taxes are returned. That pursuant to the above mentioned provisions, any special assessments on Special Assessment Roll No. 146 which were not paid when due, were transferred to the annual municipal tax rolls of the [fol. 6] years 1929 to 1933, respectively, and any such special assessments so transferred which were not paid on or before March 1st following their transfer to the annual municipal tax roll, were returned to the County Treasurer along with the unpaid municipal taxes, and any special assessments so returned were thereafter subject to the provisions of the general tax laws of the state in respect to the collection thereof, and also the sale and redemption of property for the non-payment thereof.

XI

That the amount due at the present time upon said outstanding bonds against Special Assessment District No. 146 is in excess of $11,800.00; that the amount on hand in the special assessment fund is the sum of $25.07; that the only money which will hereafter be received from special assessments already levied is that which will be paid on those assessments which were extended under the provisions of Act

No. 126 of the Michigan Public Acts of 1933, as amended (sometimes known as the Moore-Holbeck Act) and moneys allocable to said Special Assessment District No. 146 by reason of the special assessments cancelled under the provisions of the tax laws of the State of Michigan, including Act No. 155 of the Public Acts of 1937, as amended (Scavenger Sale Act) which amounts to be received from the above mentioned sources will not exceed $2,000.00.

XII

That said Special Assessment District No. 146 was constituted of Lots Nos. 21, 22, 44, 45, 74 to 128, 134 to 162 and 192 to 193, all inclusive, of Birmingham Lincoln Lots Re-Subdivision and the west 70 feet of Lots Nos. 85 and 86 and all of Lots Nos. 87 to 103, both inclusive, of Birmingham Lincoln Lots Subdivision; that the total amount assessed against the above mentioned lots in said Birmingham Lincoln Lots Re-Subdivision was the sum of $14,388.77 which was later reduced to $12,436.25; that none of said assessments against said Birmingham Lincoln Lots Re-Subdi- [fol. 7] vision have ever been paid; that the total amount assessed against the above mentioned lots in said Birmingham Lincoln Lots Subdivision was the sum of $3,405.81 which was later reduced to $2,942.61; that part but not all of said assessments against the above mentioned lots in Birmingham Lincoln Lots Subdivision have been paid.

XIII

That Section 15 of Chapter XXI of the charter of said Village of Birmingham provides as follows:

"Section 15. Should any special assessment prove insufficient to pay for the improvement or work for which it was levied, and the expenses incident thereto, the Commission may make an additional pro rata assessment to supply the deficiency; and in case a larger amount shall have been collected than was necessary, the excess shall be refunded ratably to those by whom it was paid."

XIV

That Section 18 of Chapter X of the charter of said City of Birmingham provides as follows:

"Section 18. In all cases of special assessment of any kind against any property where any such assessments shall

prove to be invalid in whole or in part, the commission shall be and it is hereby authorized to cause to be re-assessed such special assessments, and to enforce their collection; and it is further provided that whenever for any cause, mistake or inadvertence, the amount assessed shall not be sufficient to pay that portion of the cost of the improvement which the commission has determined should be assessed against the property and the owners of property in the special assessment district, then it shall be lawful, and the commission is hereby directed and authorized to cause to be made, an additional assessment upon all the property in such special assessment district to pay for such deficit; and the commission is authorized to continue requiring such re-assessment or additional assessment until a valid and sufficient assessment shall have been made."

XV

That Section 12 of Chapter XVII of the charter of said City of Birmingham provides in part as follows:

[fol. 8] "* * * and all debts and liabilities of the former Village of Birmingham shall be deemed to be the debts and liabilities of the City of Birmingham, and all taxes and special assessments levied and uncollected at the time of such change shall be collected the same as if such change had not been made; provided, that when a different remedy is given in this charter or in any ordinance pursuant thereto, which can be made applicable to any rights existing at the time this charter becomes effective, the same shall be deemed cumulative to the remedies before provided, and may be used accordingly."

XVI

That it is the duty of the defendants to proceed to make an additional assessment against the property in said Special Assessment District No. 146 sufficient to pay the principal and interest due on the outstanding bonds which were issued in anticipation of the collection of special assessments against said district.

XVII

That on the 20th day of January, 1941, the plaintiff made a demand in writing upon the Commission of the City of Birmingham for such additional assessment, a true copy of which is hereto attached, marked Exhibit "B" and made a part hereof; that notwithstanding the duty of the Commis-

sion of said city to proceed to make such additional assessment, the said Commission upon receipt of the above mentioned demand, adopted a resolution denying said demand for an additional assessment, a certified copy of the proceedings in relation thereto being hereto attached, marked Exhibit "C" and made a part hereof.

Plaintiff Therefore Prays:

(1) That the defendants be ordered to show cause why a writ of mandamus should not be issued as herein prayed.

(2) That a writ of mandamus be issued, commanding the defendants to proceed to make an additional assessment against the property in said Special Assessment District No. 146 in an amount so that the collections therefrom will be [fol. 9] sufficient to pay the principal and interest upon the outstanding bonds issued in anticipation of the collection of assessments against said special assessment district.

(3) That plaintiff may have such other and further relief to which it may be entitled.

And plaintiff will ever pray.

Municipal Investors Association, by "Berry and Stevens", Its Attorneys.

"Berry and Stevens", Attorneys for Plaintiff; "Claude H. Stevens", Of Counsel. Business Address: 1000 Penobscot Building, Detroit, Michigan.

Duly sworn to by Carl E. Huyette. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

Number 12 Dollars 1000

State of Michigan, County of Oakland

Village of Birmingham

District No. 146

Special Assessment Street Improvement Bond

Know All Men By These Presents, that the Village of Birmingham, Oakland County, Michigan, acknowledges itself to owe, and to be hereby held and firmly bound unto

the bearer in the sum of One Thousand Dollars lawful money of the United States of America, which sum it promises to pay at the office of the First National Bank in Detroit, Detroit, Michigan, on the 1st day of October, A. D. 1932, with interest thereon from the date hereof at the rate of 5¼ per cent per annum, payable semi-annually on the 1st day of April and October of each year, upon surrender of the annexed interest coupons as they severally mature, said principal and interest however, being payable from the Special Assessment fund created for the purpose. In case of the inability, neglect or refusal of said First National Bank in Detroit to act, this bond shall be payable at such other financial institution as the then Village Commission shall designate.

This bond is one of a series of 17 bonds, aggregating $17,000.00, of even date and like tenor, issued under the provisions of Section 22 of Chapter XX of the Charter of the Village of Birmingham for the purpose of raising money to pay that portion of the cost of improving the street in special assessment district No. 146, which the Village Commission has determined shall be paid by the property in said district so improved, and which assessment has been divided into five equal annual installments, beginning with the year 1928, and collection of which has been duly authorized and directed by the Village Commission.

And it is hereby certified and recited that the amount of this bond does not exceed any limit of debt as prescribed by the Village Charter, and that all acts, conditions and things required to be done precedent to and in the issuing of this bond have been done, performed and happened in regular and due form according to law.

The full faith and credit of the Village of Birmingham are hereby pledged for the punctual payment of the principal and interest of this bond from the special assessment fund created for the purpose, when the same shall have been collected.

In Testimony Whereof, the Village of Birmingham has caused its corporate seal to be hereunto affixed, and this bond to be signed by its President and Clerk this 1st day of October, A. D. 1928.

Village of Birmingham, by M. Ellerby (Signed), President. Countersigned: Myrtle E. Carson (Signed), Clerk.

[fol. 11] EXHIBIT "B" TO PETITION

Law Offices, Berry and Stevens, 1000 Penobscot Building, Detroit

January 20, 1941.

City Commission, City of Birmingham, Birmingham, Michigan.

GENTLEMEN:

The Village of Birmingham (now City of Birmingham) issued its 5¼% serial Special Assessment Bonds, dated October 1, 1928, in the aggregate principal sum of $17,000, in anticipation of the collection of special assessments against Special Assessment District No. 146, for the paving of Washington Boulevard from Clawson Road to Lincoln Avenue. Both the said bonds and the said special assessments are now past due. There are outstanding, bonds in the principal sum of $8,100 with considerable accrued interest thereon. We understand that the cash balance available for the payment of such principal and interest is approximately the sum of $25.00. The title to the most of the properties in said special assessment district passed to the state in November, 1939, by virtue of the state tax laws. These properties were subsequently sold pursuant to the provisions of Act No. 155 of the Michigan Public Acts of 1937, as amended, but the amount of such sale price allocable to said special assessment district, together with any outstanding special assessments which have not been cancelled, will be far from sufficient to pay the outstanding bonds.

The Municipal Investors Association is the holder of $6,000 of the $8,100 bonds outstanding. Demand is therefore made by the Municipal Investors Association for a reassessment against all of the property included in said Special Assessment District No. 146 in an amount sufficient to pay the principal and interest on the outstanding bonds pertaining to said Special Assessment District No. 146.

Yours very truly, Municipal Investors Association, by "Berry & Stevens," Its Attorneys.

CHS'jd.

[fol. 12] EXHIBIT "C" TO PETITION

Excerpt From Birmingham City Commission Proceedings

—43—

A communication was received from Berry & Stevens, representing the Municipal Investors Association, advising the city that demand is made by the Municipal Investors Association for re-assessment against all of the property included in Special Assessment District No. 146 in an amount sufficient to pay the principal and interest on the outstanding bonds pertaining to said Special Assessment District No. 146.

—44—

Moved by Mayor Martz.

Seconded by Commissioner Allee that the request of Berry and Stevens for re-assessment against property in District No. 146 be denied.

Yeas:—7

Nays:—0

I, Irene E. Hanley, Clerk of the City of Birmingham, Michigan, do hereby certify that the foregoing is a true and correct excerpt from the minutes of a regular meeting of the Birmingham City Commission held Monday, January 20th, 1941.

"Irene E. Hanley," City Clerk. (Seal.)

[fol. 13] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER TO SHOW CAUSE—February 7, 1941

On reading and filing the petition of the plaintiff, above named, and on motion of Berry and Stevens, attorneys for plaintiff: It is ordered that said defendants do show cause to this Court forthwith why a peremptory writ of mandamus should not be issued out of and under the seal of this Court, to compel said defendants to proceed to make an additional assessment against the property in Special

Assessment District No. 146 in said City of Birmingham in an amount so that the collections therefrom will be sufficient to pay the principal and interest upon the outstanding bonds issued in anticipation of the collection of assessments against said special assessment district, as appears by the petition filed herein.

It is further ordered that a certified copy of this order be served on the said defendants forthwith.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 14] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ANSWER OF CITY OF BIRMINGHAM, ET AL., TO PETITION FOR WRIT OF MANDAMUS—Filed February 10, 1941

City of Birmingham, a municipal corporation; The Commission of the City of Birmingham: John E. Martz (Mayor) and Ralph A. Palmer, William C. Allee, Ralph I. Coryell, Luther Heacock, Harry Bissett and Wilmer E. Moody (Commissioners), members of the Commission of the City of Birmingham, and Elmer W. Haack, Assessor of the City of Birmingham, defendants herein, answer plaintiff's petition as follows:

1. They admit all the allegations of fact contained in paragraphs I to XV, inclusive, of said petition.

2. They deny the allegations of paragraph XVI of said petition, for the reasons hereinafter set forth.

3. They admit the allegations of paragraph XVII of said petition, except the allegation that it was the duty of the [fol. 15] Commission of said City to proceed to make an additional assessment, which they deny.

4. Special assessments levied in said district have been paid in full for the following lots in Birmingham Lincoln Lots Subdivision: Nos. 88, 90, 91, 92, 94, 96, 98, 100; No. 103 and the South 45½ feet of Lot 102. The remaining lots in said subdivision, to-wit: West 70 feet of Lots 85 and 86; all of Lots 87, 89, 93, 95, 97, 99 and 101; North 19½ feet of Lot 102, were offered for sale at the annual tax

sale for the year 1938 and bid in by the State of Michigan, and were not redeemed, whereby the title to said lots passed to the State of Michigan and said lots were offered for sale in accordance with the provisions of Act No. 155 of the Public Acts of 1937, as amended, and were purchased at public sale by the former owner thereof at the statutory minimum price of twenty-five per cent (25%) of the assessed valuation thereof.

All the lots in said district situated in Birmingham Lincoln Lots Re-subdivision, being Lots 21, 22, 44, 45, 74 to 128, inclusive, 134 to 162, inclusive, 192 and 193, were offered for sale at the annual tax sale for the year 1938 and bid in by the State of Michigan, and were not redeemed, whereby the title to said lots passed to the State of Michigan and said lots were offered for sale in accordance with the provisions of Act No. 155 of the Public Acts of 1937, as amended, and were purchased at public sale by the former owner thereof at the statutory minimum price of twenty-five per cent (25%) of the assessed valuation thereof.

[fol. 16] 5. According to the tax laws of the State of Michigan all liens on lots so sold, including all taxes thereon, were cancelled.

6. Defendants are advised and believe that by the sale of said property for taxes, and the cancellation of tax liens thereon, said lots in the hands of purchasers are not subject to further assessment for the improvement for which said District No. 146 was established, and that the City Commission has no power to levy such reassessment thereon.

7. Defendants are further advised and believe that the levy of such assessment on the lots not so sold and on which special assessments have been paid in full, without the levy of assessment on the lots so sold, would be unjust, unreasonable, and confiscatory, and that the City Commission has no power to levy further assessments on the lots on which the original assessments were paid in full.

8. Defendants therefore deny that they can or should levy any further special assessment in said district No. 146, and deny that plaintiff is entitled to a writ of mandamus or any other relief in the premises.

Miller, Canfield, Paddock & Stone, Attorneys for Defendants.

Dated: the — day of ——, 1941.

[fol. 17] IN SUPREME COURT OF MICHIGAN

[Title omitted]

ANSWER AND PETITION OF ATTORNEY GENERAL, INTERVENING TO PROTECT THE RIGHTS AND INTERESTS OF THE STATE OF MICHIGAN—Filed May 9, 1941

The attorney general of the State of Michigan hereby intervenes in order to protect the right and interest of the State of Michigan in certain of the properties involved therein (Act 232, § 1, Pub. Acts 1919 (Stat. Ann. § 3.221)), and respectfully represents unto the court as follows:

First: For answer to plaintiff's petition for writ of mandamus

(1-15) the intervenor admits the allegations of paragraphs one (1) to fifteen (15), inclusive;

(16) the intervenor denies the allegations of paragraph sixteen (16) thereof;

[fol. 18] (17) the intervenor denies that it is the duty of the commission of the city of Birmingham to proceed to make an additional assessment upon the properties involved in this suit, but he admits all other allegations of the seventeenth (17th) paragraph thereof, and he denies that plaintiff is entitled to any of the relief prayed for in its petition.

Second: For answer to affirmative allegations set forth in paragraph four (4) of defendants' answer to plaintiff's petition for mandamus, the intervenor admits that special assessments levied in said district have been paid in full upon those lots in Birmingham Lincoln Lots Subdivision specified in said paragraph.

He admits that the remaining lots in said subdivision, to-wit: West 70 feet of lots 85 and 86; all of lots 87, 89, 93, 95, 97, 99 and 101; north 19½ feet of lot 102, were offered for sale at the annual tax sale for the year 1938 and bid in by the State of Michigan, whereby the title to said lots passed to the State of Michigan, and said lots were offered for sale in accordance with the provisions of Act No. 155 of the Public Acts of 1937, as amended.

But he *denies* that *all* of said lots were purchased at public sale by the former owners thereof, and avers the truth to be

[fol. 19] (1) that the west 70 feet of lots 85 and 86, all of lots 87, 101, and the north 19½ feet of 102 were purchased by and deeded to non-owners of said lots, none of whom is party to this suit, although interested in the outcome;

(2) that lot 89 was sold to a non-owner, who is not a party to this suit, although interested in its outcome;

(3) and that lots 91, 93 and 95, 97 and 99 were sold on contracts to owners, who are not parties to this suit, although interested in the outcome.

He admits that certain lots in said district situated in Birmingham Lincoln Lots Re-subdivision, being lots 21 and 22, 44, 45, 74 to 88, 89 to 110, 111 to 128, 134 to 156, 157 to 162, 192 and 193, were offered for sale at the annual tax sale for the year 1938 and bid in by the State of Michigan, and were not redeemed, whereby the title to said lots passed to the State of Michigan and said lots were offered for sale in accordance with the provisions of Act No. 155, Pub. Acts 1937, as amended.

But he *denies* that the title to said lots passed to their former owners at said public sale, and avers the truth to be

[fol. 20] (1) that on the 3rd day of March, 1940, at the annual sale at public auction conducted by the state land office board (*viz.*, the annual 'scavenger sale,' so-called), said lots, or parcels thereof, were bid in by the Depositors and Creditors Trust Company, a corporation, which claimed to be the former owner;

(2) that payment in full was not made on said several bids, but the bidder applied to the state land office board to enter into an agreement or contract of purchase, on the statutory ten-year plan in each particular instance;

(3) that in said application for land contract the 'owner' agreed

"to execute a land contract for the purchase of said lands on the form provided by the said (state land office) board within 10 days after notification by mail so to do unless said time limit is extended by the representative of the board, and upon failure to execute said land contract within the time limit as above provided all the rights of

the undersigned to meet such highest bid shall terminate without notice and the payment made herewith shall be forfeited to the State Land Office Board as liquidated damages";

(4) that thereafter the board notified the bidder that said land contract was ready for execution, but, although more than ten days have since elapsed, said contract has not been signed;

[fol. 21] (5) that, at the request of attorneys for the said Depositors and Creditors Trust Company, the bidder for said parcels of land, the time for execution of said land contract has, as intervenor is informed and verily believes, been from time to time extended,—the final agreement being that said contract shall not be signed until this court has decided the questions involved in the case at bar;

(6) that, as intervenor is informed and verily believes, the said Depositors and Creditors Trust Company takes the position, and has informed the state land office board, that it will not execute the said land contract for the purchase of said lands, but will relinquish such rights as it may have by virtue of said bid and application, in the event that the city of Birmingham reassessed the paving tax upon the lots in question;

(7) and that the intervenor is of the opinion that, in such event, absolute title to said lots will devolve upon the State of Michigan.

The attorney general is also informed, and verily believes, that members of the state land office board apprehend that, in such event, other purchasers of lots on land contract will rescind their agreements and title to said property will again become vested in the State of Michigan.

[fol. 22] *Third:* Wherefore, in the opinion of the attorney general, plaintiff's petition for mandamus should be denied

(1st) because the special paving taxes in question may not be reassessed upon property title to which is held by the State of Michigan;

(2nd) because it appears from the pleadings on file that plaintiff's action is premature; and

(3rd) because in no event is plaintiff entitled to relief.

Herbert J. Rushton, Attorney General. By Edmund E. Shepherd, Solicitor General.

Duly sworn to be Marshall P. Witchell. Jurat omitted in printing.

[fol. 23] IN SUPREME COURT OF MICHIGAN

[Title omitted]

REPLY OF PLAINTIFF—Filed May 23, 1941

Plaintiff, in reply to certain matters set forth in the answer of the defendants and in the answer of the Attorney General intervening on behalf of the State of Michigan, says:

(1) It admits the allegations contained in paragraph 4 of the answer of the original defendants except as to the allegation that the West 70 feet of Lots 85 and 86, all of Lots 87, 89 and 101 and the North 19 feet of Lot 102 were purchased by the former owners thereof, and as to such lots plaintiff accepts the statement contained in the answer of the Attorney General to the effect that said lots were sold under the provisions of Act No. 155 of the Public Acts of 1937, as amended, to persons who were not the former owners thereof. Plaintiff alleges however that it is immaterial to the issues in this case whether said lots were or were not sold to former owners thereof.

[fol. 24] (2) It denies the legal conclusions contained in paragraphs 5, 6, 7 and 8 of the answer of the original defendants.

(3) It admits the allegations contained in paragraph "Second" of the answer of the Attorney General, relating to lots in Birmingham Lincoln Lots Subdivision. Plaintiff, upon information and for the purpose of this action, admits the allegations contained in paragraph "Second" of said answer relating to lots in Birmingham Lincoln Lots Re-Subdivision but denies that the circumstances therein set forth constitute a defense to plaintiff's petition. That the purchaser at the Scavenger Sale of the lots in Birmingham Lincoln Lots Re-Subdivision has not as yet sur-

rendered its rights under such sale and the State Land Office Board has not yet released it from its obligations as such purchaser. That said lots are subject to taxation even though the contract therefor has not yet been executed.

(4) It denies that its petition for writ of mandamus should be denied for the reasons set forth in paragraph "Third" of the answer of the Attorney General.

(5) Plaintiff, in further reply to the aforementioned answers, says that if Act No. 206 of the Public Acts of 1893, as amended, and Act No. 155 of the Public Acts of 1937, as amended, are to be construed as cancelling plaintiff's right to a reassessment under the provisions of the charter of the Village of Birmingham, then said acts to that extent are unconstitutional in that they impair the obligation of plaintiff's contract in violation of Section 9 of Article II of the Michigan Constitution and Section 10 of Article I of the Federal Constitution, and deprive plaintiff of its property without due process of law in violation of Section 16 of Article II of the Michigan Constitution and the 5th and 14th Amendments to the Federal Constitution.

(6) Plaintiff alleges that notwithstanding anything con-
[fol. 25] tained in either of said answers, it is entitled to a writ of mandamus as prayed.

Municipal Investors Association, by "Berry and Stevens", Its Attorneys. "Berry & Stevens", Attorneys for Plaintiff, 1000 Penobscot Building, Detroit, Michigan.

Duly sworn to by Carl E. Huyette. Jurat omitted in printing.

[fol. 26] IN SUPREME COURT OF MICHIGAN

MUNICIPAL INVESTORS ASSOCIATION, Plaintiff,

vs.

CITY OF BIRMINGHAM, et al., Defendants

OPINION

Before the Entire Bench—except Butzel.

CHANDLER, J.:

Plaintiff is the holder of six $1,000 bonds numbered 12 to 17 inclusive, which were issued by the Village of Birming-

ham on October 1, 1928, as part of a series of 14 bonds of like denomination in anticipation of the collection of special assessments to be assessed against special assessment district No. 146, composed of 106 lots to be improved by a street-paving project. The Village of Birmingham reincorporated as the city of Birmingham in 1933, and the city assumed all of the debts and liabilities of the village including these bonds which bore interest at the rate of 5¼ per cent, per annum, and matured on October 1st of the year indicated as follows: $4,000—1929; $3,000—1930; $4,000—1931; $3,000—1932; and $3,000—1933. In addition to the bonds which plaintiff holds, there are yet outstanding 3 of 4 bonds which were issued to refund the obligations maturing in 1931.

The special assessment district consisted of 18 lots in Birmingham Lincoln Lots subdivision and 88 lots in Birmingham Lincoln Lots resubdivision. The sum of $14,388.77, later reduced to $12,436.25, was levied against the resubdivision property, but nothing was ever paid thereon. An assessment of $3,405.81, later reduced to $2,942.61, was made against the subdivision premises, but payment was made on only 9 and a fraction lots.

[fol. 27] A payment of $100 was made upon plaintiff's bonds on June 19, 1939, and upon the refunded obligations on November 28, 1939, leaving a principal amount of $8,100 due and owing, which with accrued interest to January 1, 1941, constitutes an outstanding indebtedness in excess of $11,800. The amount on hand in the assessment fund is $25.67.

All the lots in both subdivisions upon which assessments were levied but not paid were offered for sale at the annual tax sale for the year 1938 and bid in by the State of Michigan. Title passed to the State upon failure of the owners to exercise their right of redemption.

Alleging that no more than $2,000 will be received upon the assessments already made and moneys allocable to the assessment district by reason of the cancellation of special levies under the provisions of Act No. 155, Pub. Acts 1937, as amended (Comp. Laws Supp. 1940, Sec. 3723-1 to 3723-14, Stat. Ann. Sec. 7.951 et seq.), plaintiff instituted this action for a writ of mandamus to compel defendants to make an additional assessment, a demand for a reassessment of the property in the district in an amount sufficient to pay the

principal and interest of the outstanding bonds having been denied by the defendant city commission.

Plaintiff argues that the officials of the city of Birmingham are required by charter to make an additional deficiency levy and that the sale of the property to the State under the general property tax laws and subsequent conveyance by the State under Act No. 155, Pub. Acts 1937, as amended, does not preclude such levy, for such sale affects only existing liens and not additional deficiency liens which were nonexistent at the time of sale. Defendants have assumed that it would have been the duty of the city commission to have levied additional deficiency assessments had there been no tax sale, but vigorously resist this proceeding upon the theory that they have been relieved of such duty and no longer have the power to levy further assessments by reason of the cancellation of taxes and assessments when absolute title to most of the lots in the district vested in the State and did not revive when the lots were repurchased by [fol. 28] the former owner in accordance with the terms of Act No. 155, Pub. Acts 1937, subsequently amended by Acts Nos. 29, 244, and 329, Pub. Acts 1939, and the general property tax law, as amended by Acts Nos. 114 and 325, Pub. Acts 1937.

In the recent case of Baker v. State Land Office Board, 294 Mich. 587, 592-594, Justice McAllister described the background giving rise to the enactment of the foregoing statutes:

"Between the years 1920 and 1930 speculative activities in real estate in the State, unrestrained by normal caution and on a scale unparalleled, had resulted in platting subdivisions with building lots sold at highly inflated prices. The same exaggeration seeped into farm lands and business properties in cities. During this period municipalities and their officials encouraged the speculative movement by approval, in undeveloped areas, of widespread improvements, including sewer extensions, sidewalks, and pavements. The entire movement was pervaded by an enthusiasm uncolored by moderation. But all of these plans and hopes collapsed under the pitiless and inexorable advance of economic depression, of which this court has on several occasions taken judicial notice. * * *"

"The result of this activity was that taxes on excessively high assessments became delinquent and accumulated in

amount until they greatly exceeded the assessed valuation. For approximately six years subsequent to 1932, no tax sales were held; moratorium statutes were passed by the legislature, embodying waiver of interest and penalty charges and providing for payment of taxes in instalments covering a 10-year period; but such efforts were in vain, and the unpaid taxes accumulated until in some counties they exceeded five times the amount of the assessed valuation of the property. Planning commissions, which occupied themselves with a possible solution of the problem, were appointed by the governor, and concluded that the various plans to remedy the situation had failed to stop the abandonment of tax delinquent land; and legislative committees made exhaustive studies in an effort to devise means of overcoming the rapidly growing peril which was assuming catastrophic form. The result was the enactment of Act. No. 155, Pub. Acts 1937, and the amendment of the general property tax law by Acts Nos. 114 and 325, Pub. Acts 1937."

One cannot but conclude, considering the motivating force behind this legislation, that it was the answer of the legislature to the desperate problem of delinquent taxes based upon property valuation having no foundation in fact, and to clear away the debris left by an abnormally high tide of prosperity swept up by an irresistible current of speculation.

"The primary and inducing purpose of the legislation was to secure a portion of the unpaid taxes, rather than nothing, and to restore lands to a tax-paying basis, instead of supinely allowing them to accumulate tax delinquencies with no hope of ever recovering them." Baker v. State Land Office Board, supra, 606.

[fol. 29] Pursuant to legislative intent the Michigan Supreme Court has held that a taxpayer may bring mandamus to compel a city to place on its tax rolls immediately all parcels of land sold under the "scavenger" act even though the State land office board had not as yet executed deeds or contracts to the successful bidder; that such lands are subject to taxation when a bid is accepted and notice of sale given by the agent of the board to the county treasurer who in turn is obliged to notify the proper assessing officers. Wilson v. City of Pontiac, 294 Mich. 79.

It is remedial legislation and is to be construed as such. Oakland County Treasurer v. Auditor General, 292 Mich. 38.

"In interpreting the act our duty is to ascertain the meaning of the statute, to give it full force and effect, coloring our construction by the purpose of its enactment. The statute is remedial and is entitled to a liberal construction. * * * It is said to be the duty of the court to draw inferences from the evident intent of the legislature, as gathered from a view of the law in its entirety; we must render effectual the specific things which are included in the broad and comprehensive items and purposes of the law." Wilson v. City of Pontiac, supra, 86.

Plaintiff says that the additional assessment sought in this case has not yet been levied against the premises and therefore was not a lien when the State acquired title pursuant to the terms of the general tax laws, and hence was not extinguished. A contrary holding, argues plaintiff, would result in the impairment of contractual obligations. In the Baker case, supra, it was claimed that there was nothing in the title of the general property tax law as amended by Act No. 114, Pub. Acts 1937 (Comp. Laws Supp. 1940, Sec. 3459, Stat. Ann. 1940 Cum. Supp. Sec. 7.112), to indicate that it covered the cancellation of past as well as future taxes and special assessments, or that municipalities which have borrowed in anticipation of the collection of taxes or issued special assessment bonds shall have such taxes and assessments cancelled. A review of the briefs filed in the Baker case shows that counsel for plaintiff herein filed a brief amicus curiae in which many of the cases relied upon by plaintiff in the instant suit were cited. Notwithstanding the fact that the court had those cases before it, the argument made was repudiated upon the [fol. 30] ground that it was unnecessary to include in the title the nature of the interest secured by the purchaser upon the sale, as well as the specific tax incumbrances from which the property was freed in such proceedings, and the court concluded that the statutes in question do not contravene the requirements of the State or Federal Constitution forbidding the impairment of the obligations of contract.

"It is claimed that the statute destroys vested rights of municipalities to tax liens and assessments already assessed

and levied, and destroys property and contract rights of individuals who have purchased bonds under the assumption of their payment through collection of the very taxes and assessments which the act cancels. In addition to our determination as above expressed, it can be said that such purchasers can be assumed to have purchased with knowledge that the lien upon the property securing such taxes and assessments might be displaced." Baker v. State Land Office Board, supra, 599.

That act, passed the same year as Act No. 155, Pub. Acts 1937, amended section 67 of Act No. 206, Pub. Acts 1893 (1 Comp. Laws 1929, Sec. 3459), and added the following significant language to the decree to be entered upon the sale of property for tax delinquencies:

"'It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the State, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and incumbrances, of whatever kind or nature * * * cancelled as of such date. * * *'

"Upon the entering of the decree hereinbefore provided for, absolute title to the lands therein shall vest in the State of Michigan as provided in said decree."

Act No. 155, Sec. 9, Pub. Acts 1937, defining the authority of the State land office board to execute deeds and conveyances, reads in part as follows:

"Any quitclaim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any incumbrances, except as herein otherwise provided."

The exception referred to is not pertinent to this discussion.

Act No. 244, Pub. Acts 1939, which amended Act No. 155, Sec. 10, Pub. Acts 1937, provides for the division of the receipt of moneys by the State land office board "in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under [fol. 31] the provisions of this act, by the board, any county

treasurer or the department of conservation," and refers to the title acquired by the State in these words:

"Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the State of Michigan."

The clear import of the language of the foregoing amendatory enactments, and the obvious intent and purpose of the legislature to relieve owners from the weight of accumulated obligation, James A. Welch Co., Inc., v. State Land Office Board, 295 Mich. 85, must lead one to the conclusion that when title to the lots here in question became absolute in the State of Michigan upon expiration of the period of redemption provided by the tax law free of all taxes and other liens and incumbrances of whatever kind or nature, and future and deficiency as well as past assessments and taxes were cancelled. To hold otherwise would defeat the purpose of this remedial legislation by a narrow and unwarranted construction, and would once again give rise to the vicious circle of assessment based upon inflated valuation; refusal or inability of the owner to pay; followed by a sale of the premises pursuant to the State's sovereign power of enforcing the collection of taxes.

It should be borne in mind that when the lots in question were sold for delinquencies, upon failure to redeem, the title vested absolutely in the State with power to dispose of them in any way not contrary to the Constitution. Upon resale by the State land office board, a new chain of title originated, evidenced by a quitclaim deed, "free of any incumbrances."

Said Justice Cooley in the early case of Sinclair v. Learned, 51 Mich. 335, 344:

"Every sale of lands under our tax system is a sale of the complete title; and if legal, all prior titles are cut off by it."

In the more recent case of Krench v. State of Michigan, 277 Mich. 168, 179, it is stated:

"The State held title in fee simple. The original title had come to an end and a new chain of title originated with the State. The deed to Lucinda Turner was no part of any statutory proceedings instituted for the purpose of fore-

[fol. 32] closing the interest of an original owner who had become delinquent in the payment of taxes. This should be kept in mind for it notes the distinction between sales calculated to cut off former ownership and that of vested ownership in the State. In the one instance the statute divests title in one and vests it in another through tax foreclosure proceedings, while in the other a new title originates by deed from the State. The State, having title in fee, could like any other owner in fee, deed with reservation of oil, gas and minerals. It needed no amendment to an inapplicable statute to enable the State, by legislative enactment, to establish a policy with reference to land owned by the State in fee. The deed to Lucinda Turner was not a tax sale deed but one upon bargain, with sale by the State, the owner in fee of the land, and such owner could and did sever the divisible fees."

The rule is reiterated in Rathbun v. State of Michigan, 284 Mich. 521, 539, in these words:

"By the foregoing provisions there can be no doubt that after the period for redemption of property bid off to the state for delinquent taxes, the State receives the absolute title to such lands, and in the instant case the State owned the absolute title to the lands in controversy prior to any of the transactions with J. F. Rathbun."

"Inasmuch as the State is the absolute owner of the lands, the legislature is empowered to provide for the sale thereof in any way not prohibited by the Constitution." Baker v. State Land Office Board, supra, 602.

See, also, Hoffman v. Otto, 277 Mich. 437.

The Legislative body of the State has determined in what manner lands owned by the State shall be sold. In a long and able opinion to which reference has been made the constitutionality of this legislation was upheld, and having determined that the right to make any further special deficiency assessments as well as actual assessments made are totally and completely extinguished and cancelled, it follows that petitioner's demand for a writ of mandamus should be and is denied.

No costs awarded, a public question being involved.

Sharpe, C. J., and Bushnell, Boyles, North, and Wiest, JJ., concurred with Chandler, J.

Concurring Opinion

Sharpe, C. J.:

I concur in the result reached by Mr. Justice Chandler. The paramount question involved in this case may be stated as follows: Do the statutes here involved prevent reassessment on special assessment districts when the land in such districts has been bid in by the State at the tax sale and then resold under the so-called scavenger act?

Act No. 206, Sec. 67, Pub. Acts 1893, as last amended by Act No. 282, Pub. Acts 1939 (Comp. Laws Supp. 1940, Sec. 3459, Stat. Ann. 1940 Cum. Supp. Sec. 7.112), dealing [fol. 33] with the decree to be entered upon the sale of property for tax delinquencies, provides:

"'It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the State, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and incumbrances, of whatever kind or nature, cancelled as of such date.' • • •

"Upon the entering of the decree hereinbefore provided for, absolute title to the lands therein shall vest in the State of Michigan as provided in said decree."

Act No. 155, Sec. 9, Pub. Acts 1937 (Comp. Laws Supp. 1940, Sec. 3723-9, Stat. Ann. 1940 Cum. Supp. Sec. 7.959), defining the authority of the State land office board to execute deeds and conveyances, reads as follows:

"Any quitclaim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any incumbrances."

Under the above authority, when the land is sold to the State for tax delinquencies, all incumbrances upon the land are discharged; and under the scavenger act, such land owned by the State is sold by it free of all incumbrances. Is the liability to reassessment an incumbrance within the meaning of these statutes? It is the general rule that a special assessment does not become an incumbrance until it has become a lien against the premises. See 72 A. L. R. 302; Jaques v. Tomb, 179 Calif. 444 (177 Pac.

280); Cemansky v. Fitch, 121 Iowa, 186 (96 N. W. 754); Metropolitan Life Ins. Co. v. Union Trust Co., 283 N. Y. 33 (27 N. E. 2d 225, 128 A. L. R. 370); Lindsay v. Eastwood, 72 Mich. 336.

In Post v. Campau, 42 Mich. 90, we said:

"Anything is an incumbrance which constitutes a burden upon the title; a right of way, Clark v. Swift, 3 Metc. (44 Mass.) 390, 392; a condition which may work a forfeiture of the estate, Jenks v. Ward, 4 Metc. (45 Mass.) 404, 412; a right to take off timber, Cathcart v. Bowman, 5 Pa. 317; a right of dower, whether assigned or unassigned, Runnels v. Webber, 59 Me. 488. In short, 'every right to, or interest in the land, to the diminution of the value of the land; but consistent with the passage of the fee by the conveyance.' Prescott v. Trueman, 4 Mass. 627, 630 (3 Am. Dec. 246)."

[fol. 34] Under the above definition of an incumbrance, it would naturally follow that the possibility of reassessment would constitute an incumbrance and thus be cancelled. Moreover, the city of Birmingham has no power or authority to levy a special assessment against the land while it is owned by the State of Michigan.

In People, ex rel. Auditor General, v. Ingalls, 238 Mich. 423, 425, we said:

"The doctrine has been pretty well settled in this State and elsewhere that property owned by the State or by the United States is not subject to taxation unless so provided by positive legislation. And municipalities and State agencies are included in this class when their property is used for public purposes. The reason which supports this doctrine is that, if taxes were permitted to be levied against the sovereign, it would be necessary to tax itself in order to raise money to pay over to itself. This would be an idle thing to do. And, besides, it is rather incongruous that the creature should have the right to tax its creator without its consent. Out of this reason has grown an implied presumption that the State is exempt from all taxes unless the one asserting it can point to some legislation in support of it. We are not aware of any law, nor has any been called to our attention, which authorizes the city of Detroit to levy any tax or assessment against State property. Unless it can do this, its contention must fail. Again, if this tax can be levied against State property, who has authority to

pay the tax, and, if it is not paid, who has authority to sell the land to pay the tax?"

The writ is denied.

Bushnell, Boyles, and North, JJ., concurred with Sharpe, C. J. Butzel, J., did not sit. McAllister, J., took no part in this decision.

[fol. 35] IN SUPREME COURT OF MICHIGAN

41532

MUNICIPAL INVESTORS ASSOCIATION, a Michigan corporation, Plaintiff,

vs.

CITY OF BIRMINGHAM, et al., Defendants

ORDER DENYING WRIT OF MANDAMUS—June 30, 1941

This matter having been heard upon the petition of plaintiff, the answer of defendant, the answer of the intervening defendant, the reply of the plaintiff to said answers, and the briefs of counsel for the respective parties hereto, and due consideration thereof having been had by the Court, and it appearing to this Court upon such consideration that the writ of mandamus as prayed for by plaintiff ought not to be granted, it is hereby denied, but without costs to either party.

Clerk's Certificate to foregoing order omitted in printing.

[fol. 36] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN TO THE SUPREME COURT OF THE UNITED STATES—Filed September 24, 1941

To The Honorable Frank Murphy Associate Justice of the Supreme Court of the United States:

Your petitioner, Municipal Investors Association, a corporation organized and existing under the laws of the State of Michigan, respectfully shows:

I

That petitioner is the plaintiff and appellant in the above entitled cause.

[fol. 37]

II

That petitioner filed its petition in the above entitled cause in the Supreme Court of the State of Michigan on the 7th day of February, A. D. 1941, praying that a writ of mandamus be issued commanding the defendants therein to proceed to make a deficiency assessment against the property in Special Assessment District No. 146 in the City of Birmingham, Michigan, in an amount so that *that* collections therefrom would be sufficient to pay the principal and interest upon the outstanding unpaid bonds issued in anticipation of assessments against said special assessment district, a major portion of which bonds are held by your petitioner; that on the 7th day of February, A. D. 1941, an order to show cause was issued by the Supreme Court of the State of Michigan to the defendants, ordering the said defendants to show cause why a peremptory writ of mandamus should not be issued in accordance with the prayer in said petition; that said cause was heard by the Supreme Court of the State of Michigan upon the petition of plaintiff, the answer of defendants, the answer of the intervening defendant, State of Michigan, the reply of plaintiff to said answers, and the printed briefs and oral arguments of counsel.

III

That on the 30th day of June, A. D. 1941, the Supreme Court of the State of Michigan rendered its decision holding that plaintiff was not entitled to the relief prayed for by it in said petition; and that on said 30th day of June, A. D. 1941, an order was entered in said cause in the Supreme Court of the State of Michigan denying to the plaintiff a writ of mandamus; and that said order was the final judgment of said court, which is the highest court of the State of Michigan in which a decision in said suit could be had.

IV

That in said cause there was drawn in question the validity of the following statutes of the State of Michigan, to-wit:

(a) Act No. 206 of the Michigan Public Acts of 1893, as amended;

[fol 38] (b) The amendments to Section 67 of Act No. 206 of the Michigan Public Acts of 1893, which are em-

bodied in Act No. 114 of the Michigan Public Acts of 1937 and in Act No. 282 of the Michigan Public Acts of 1939;

(c) Section 67 (a) of Act No. 206 of the Michigan Public Acts of 1893, which section was added by Act No. 114 of the Michigan Public Acts of 1937 and amended by Act No. 282 of the Michigan Public Acts of 1939;

(d) Act No. 114 of the Michigan Public Acts of 1937;

(e) Act No. 282 of the Michigan Public Acts of 1939;

(f) Act No. 155 of the Michigan Public Acts of 1937, as amended by Acts Nos. 29, 244 and 329 of the Michigan Public Acts of 1939, and particularly Sections 9 and 10 of said Act No. 155;

in so far as the said statutes cancel plaintiff's right to a deficiency assessment for the payment of its bonds, on the ground that said statutes are repugnant to the Constitution of the United States; and that the decision of the Supreme Court of the State of Michigan was in favor of the validity of said statutes notwithstanding your petitioner's contention to the contrary.

V

That the judgment and decision of said court was erroneous in sustaining the validity of the aforesaid acts; said acts being in violation of that part of Section 10 of Article I of the Constitution of the United States which provides that "No state shall * * * pass any * * * law impairing the obligation of contracts * * *"; that portion of the 5th amendment to the Constitution of the United States which provides that "No person shall * * * be deprived of * * * property without due process of law"; and that portion of the 14th amendment to the Constitution of the United States which provides that "Nor shall any state deprive any person of * * * property without due process of law".

VI

That the errors upon which petitioner claims to be entitled to an appeal are more fully set out in the assignment [fol. 39] of errors filed herewith; and that there is also filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by the rules of said court.

Wherefore, petitioner prays for the allowance of an appeal from said Supreme Court of the State of Michigan to

decision of the Supreme Court of the State of Michigan may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the Supreme Court of the United States in order that the the State of Michigan, may be sent to the Supreme Court of the United States as provided by law.

Berry and Stevens, Claude H. Stevens, Attorneys for Petitioner and Proposed Appellant. Business Address: 1000 Penobscot Building, Detroit, Michigan.

Dated: September 24, 1941.

[fol. 40] IN SUPREME COURT OF MICHIGAN.

[Title omitted]

ORDER OF CHIEF JUSTICE OF THE SUPREME COURT OF MICHIGAN DENYING APPLICATION FOR APPEAL—September 24, 1941

The appellant having presented its application for appeal to the Supreme Court of the United States from the judgment entered on the 30th. day of June 1941 in said cause, which application was accompanied by appellant's assignments of errors and statement of jurisdiction, the said application is hereby denied.

Edward M. Sharpe, Chief Justice of the Supreme Court of the State of Michigan.

September 24, 1941.

[fol. 41] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—October 15, 1941

The petition of Municipal Investors Association, the appellant in the above entitled cause, for an appeal in said cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Michigan, together with the assignment of errors and the statement

of jurisdiction, have been presented to the undersigned and the records in this cause having been considered,

It Is Hereby Ordered, that an appeal be and it is hereby allowed to the Supreme Court of the United States from the [fol. 42] final judgment in said cause, dated the 30th day of June, 1941, of the Supreme Court of the State of Michigan, as prayed in said petition, and the Clerk of the Supreme Court of the State of Michigan shall within forty (40) days from this date make and transmit to the Supreme Court of the United States under his hand and the seal of said court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein.

It Is Further Ordered, that the said appellant shall give a good and sufficient cost bond in the sum of Five Hundred Dollars ($500.00), that said appellant shall prosecute said appeal to effect and answer all costs if he fails to make his plea good.

Frank Murphy, Associate Justice of the Supreme Court of the United States.

Dated: October 15th, 1941.

[fol. 43] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—September 24, 1941

The said Municipal Investors Association assigns the following errors in the records and proceedings in said cause:

1. That the Supreme Court of the State of Michigan in holding that those properties in Special Assessment District No. 146 in the Village (now City) of Birmingham, Michigan, which were sold to the State of Michigan at the tax sale in 1938 and not redeemed within eighteen months thereafter at which time title became absolute in the State of Michigan, and which were later sold to the former owner thereof pursuant to the terms of Act No. 155 of the Michigan Public Acts of 1937, as amended, were not subject to a [fol. 44] future deficiency assessment granted by the

charter of said village for the payment of plaintiff's bonds issued in the year 1928, erred for the following reasons:

(a) that there is no valid statutory authority for such a holding;

(b) that the statutes adopted in 1937 and 1939 (Act No. 114 of the Michigan Public Acts of 1937, Act No. 282 of the Michigan Public Acts of 1939 and Act No. 155 of the Michigan Public Acts of 1937, as amended by Acts Nos. 29, 244 and 329 of the Michigan Public Acts of 1939) upon which such holding was based, are unconstitutional in so far as the said statutes cancel plaintiff's right to a deficiency assessment for the payment of its bonds, in that said statutes impair the obligation of plaintiff's pre-existing contract in violation of Section 10 of Article I of the Constitution of the United States and deprive plaintiff of its property without due process of law in violation of the 5th and 14th Amendments to said Constitution.

2. That the Supreme Court of the State of Michigan erred in refusing to hold that the above mentioned statutes were unconstitutional as being repugnant to the aforesaid provisions of the Constitution of the United States.

3. That the Supreme Court of the State of Michigan, after holding that the aforesaid statutory provisions adopted in the years 1937 and 1939 should be construed to cancel future deficiency assessments as well as past assessments and taxes against property sold under the provisions of Act No. 155 of the Michigan Public Acts of 1937, as amended, erred in holding that the above mentioned statutory provisions as so construed by the court, were not unconsitutional as being repugnant to the aforementioned provisions of the Consitution of the United States, and erred in refusing to hold that said statutory provisions were unconstitutional for such reason.

[fol. 45] 4. That the Supreme Court of the State of Michigan erred in holding that the provisions of Section 67 of Act No. 206 of the Michigan Public Acts of 1893, as said section was amended by Act No. 114 of the Michigan Public Acts of 1937 and Act No. 282 of the Michigan Public Acts of 1939, in so far as the amendments thereto made in the years 1937 and 1939 cancelled plaintiff's pre-existing right to a deficiency assessment for the payment of its bonds,

were not unconstitutional as being repugnant to the above mentioned provisions of the Constitution of the United States; and in refusing to hold that said section was repugnant to said constitutional provisions.

5. That the Supreme Court of the State of Michigan erred in holding that the provisions of Act No. 155 of the Michigan Public Acts of 1937, as amended by Acts Nos. 29, 244 and 329 of the Michigan Public Acts of 1939 and particularly Sections 9 and 10 of said Act No. 155, as amended, in so far as they cancelled plaintiff's right to a deficiency assessment, were not unconstitutional as being repugnant to the above mentioned provisions of the Constitution of the United States; and in refusing to hold that the provisions of said section were repugnant to said constitutional provisions.

6. That the Supreme Court of the State of Michigan erred in holding that Act No. 206 of the Michigan Public Acts of 1893, as amended by Act No. 114 of the Michigan Public Acts of 1937 and Act No. 282 of the Michigan Public Acts of 1939, and Act No. 155 of the Michigan Public Acts of 1937, as amended by Acts Nos. 29, 244 and 329 of the Michigan Public Acts of 1939, in so far as any parts of said acts adopted subsequent to the issuance of plaintiff's bonds, cancel plaintiff's right to a deficiency assessment for the payment of such bonds, were constitutional and not repugnant to the above mentioned provisions of the Constitution of the United States; and in refusing to hold that said acts were unconstitutional as being repugnant to said constitutional provisions.

[fols. 46-66] 7. The Supreme Court of the State of Michigan erred in entering its order of June 30, 1941, denying to plaintiff a writ of mandamus as prayed, for the reason that such denial was based upon the provisions of the statutes hereinbefore mentioned, which statutes are unconstitutional in that they impair the obligation of plaintiff's pre-existing contract contrary to the provisions of Section 10 of Article 1 of the Constitution of the United States and deprive plaintiff of its property without due process of law contrary to the provisions of the 5th and 14th Amendments to said Constitution.

For which errors the appellant, Municipal Investors Association, prays that the judgment of the Supreme Court of

the State of Michigan entered in said cause on the 30th day of June, 1941, be reversed and a judgment rendered in favor of the appellant and that said cause be remanded to the Supreme Court of the State of Michigan for such additional action by said court as may be necessary in order that appellant may have the relief prayed for in its petition for a writ of mandamus.

Berry & Stevens. Claude H. Stevens, Attorneys for Plaintiff and Appellant. 1000 Penobscot Building, Detroit, Michigan.

Dated: September 24, 1941.

[fols. 67-70] Cost Bond on appeal for $500 approved Oct. 15, 1941, and filed Oct. 20, 1941 omitted in printing.

[fols. 71-74] Citation in usual form showing service. Miller, Canfield, Paddock & Stone and Harry Allen et al., omitted in printing.

[fol. 75] In Supreme Court of Michigan

[Title omitted]

Praecipe Re Transcript of Record—October 20, 1941

To the Clerk of the Supreme Court of the State of Michigan:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following papers and no others, to-wit:

(1) Copy of calendar entries.
(2) Copy of plaintiff's petition for writ of mandamus.
(3) Copy of order to show cause issued February 7, 1941.
(4) Copy of defendants' answer.
(5) Copy of intervening petition and answer of the State of Michigan.

(6) Copy of plaintiff's reply to answer of defendants and intervening defendant.

[fol. 76] (7) Copy of opinions of the Court, filed June 30, 1941.

(8) Copy of the final order of the Court, made June 30, 1941.

(9) Plaintiff's petition for appeal to the United States Supreme Court.

(10) Plaintiff's assignments of errors.

(11) Plaintiff's jurisdictional statement.

(12) Order allowing appeal made by the Honorable Frank Murphy, Associate Justice of the United States Supreme Court.

(13) Bond on appeal.

(14) Citation, dated October 15, 1941, signed by the Honorable Frank Murphy, Associate Justice of the Supreme Court of the United States, together with acknowledgment of service.

(15) Notice by attorneys for plaintiff to defendants and intervening defendant, and their respective attorneys, calling attention to paragraph 3 of Rule 12 of the Rules of the United States Supreme Court, together with acknowledgment of service thereof and receipt of various papers therein mentioned.

(16) This praecipe.

Berry & Stevens, Claude H. Stevens, Attorneys for Plaintiff and Appellant. 1000 Penobscot Building, Detroit, Michigan.

Dated: October 20, 1941.

We hereby agree that the papers listed in the foregoing praecipe shall constitute the record on appeal in the above entitled cause.

Miller, Canfield, Paddock & Stone, by Fred Glover Jr., Harry Allen, Attorneys for Defendants and Appellants.

Dated: October 20, 1941.

H. J. Rushton, Attorney General, Edmund E. Shepherd, Solicitor General, Attorneys for State of Michigan, Intervening Defendant and Appellee.

Dated: October 31, 1941.

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 78-79] In Supreme Court of the United States

[Title omitted]

Statement of Points and Designation of Record to be Printed—Filed November 24, 1941

The Municipal Investors Association, Appellant in the above entitled cause, pursuant to paragraph 9 of rule 13 of the Revised Rules of the Supreme Court of the United States, adopts its assignments of error as its statement of the points on which it intends to rely, and designates the whole of the transcript of record as filed with the Clerk of the Supreme Court of the United States, as necessary for the consideration of said cause by the Supreme Court of the United States except that in the printing of the record there shall be omitted the bond on appeal (if not required by the rules or practice of the court) and either the copy of the two opinions of the Supreme Court of Michigan first appearing in the transcript of record or that copy of such opinions attached to the jurisdictional statement (with proper notation of such omission).

Claude H. Stevens, Berry & Stevens, Attorneys for Appellant. Business Address: 1000 Penobscot Building, Detroit, Michigan.

Dated: November 18, 1941.

[fol. 80] Supreme Court of the United States, October Term, 1941

No. 755

[Title omitted]

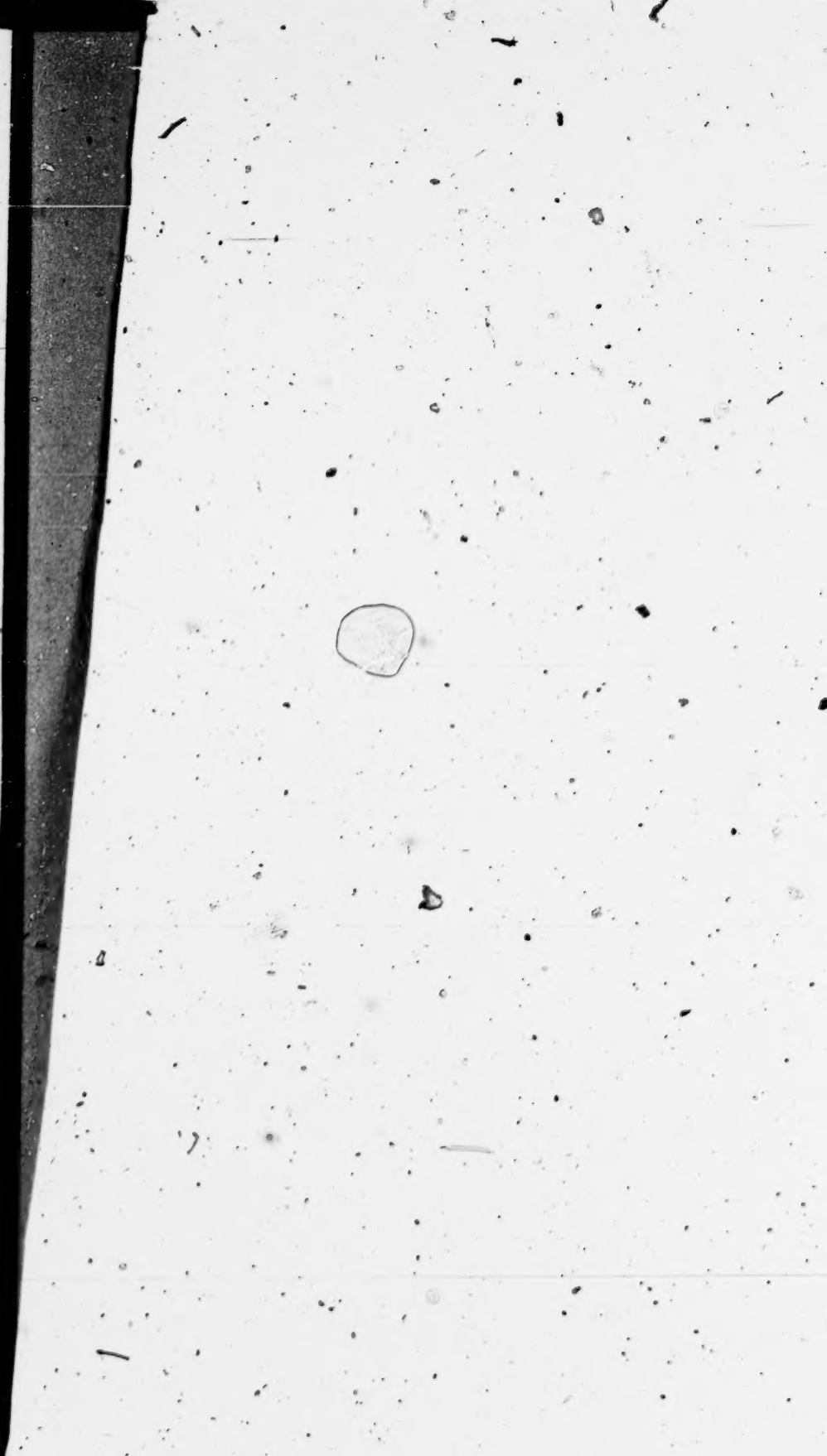
Order Postponing Consideration of Jurisdiction Until Hearing on the Merits—December 15, 1941

The statement of jurisdiction in this case having been submitted to the Court, further consideration of the ques-

tion of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

[Endorsed on Cover:] File No. 46,083, Michigan Supreme Court, Term No. 755. Municipal Investors Association Appellant, vs. City of Birmingham, a Municipal Corporation, et al. Filed November 24, 1941. Term No. 755 O. T. 1941.

(8464)



FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Appellant,

vs.

CITY OF BIRMINGHAM, A MUNICIPAL CORPORATION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

STATEMENT AS TO JURISDICTION.

CLAUDE H. STEVENS,
Counsel for Appellant.

BERRY & STEVENS,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
Nature of the case	2
Date of application for appeal	3
State statute the validity of which is involved	4
Supplemental statement	13
Exhibit "A"—Opinion of the Supreme Court of Michigan	14

Table of Cases Cited.

American Express Co. v. *Michigan*, 177 U. S. 404	12
Baker v. *State Land Office Board*, 294 Mich. 587	7
Borough of Fort Lee, N. J. v. *United States*, 104 F. (2d) 275	11
Brown-Crummer Inv. Co. v. *Paulter*, 70 F. (2d) 184	11
Hamilton v. *Regents of University of California*, 293 U. S. 245	12
Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398	11
Hubert v. *New Orleans*, 215 U. S. 170	12
Millsaps College v. *City of Jackson*, 275 U. S. 129	12
Memphis v. *United States*, 97 U. S. 293	12
Mobile v. *Watson*, 116 U. S. 289	12
Moore v. *Branch*, 5 Fed. Supp. 1011	11
Mullen Benevolent Corp. v. *United States*, 290 U. S. 89	8
Municipal Investors Assoc. v. *City of Birmingham*, 298 Mich. 314	8
Nelson v. *Pitts*, 53 A. L. R. 1137	11
Scotland County Court v. *Hill*, 140 U. S. 41	12
Seibert v. *Lewis*, 122 U. S. 284	12
Senn v. *Tile Layers Protective Union*, 301 U. S. 468	12
Van Hoffman v. *City of Quincy*, 4 Wall. 535	12
W. B. Worthen Co. v. *Kavanaugh*, 295 U. S. 56	11

STATUTES CITED.

	Page
Charter of the City of Birmingham, Chapter 21, Section 15	5
Michigan Compiled Laws, 1929, Section 3520	8
Michigan Public Acts of 1893, Act No. 206 (Vol. 1, Compiled Laws Mich., 1929, pages 1305-1412; Vol. 5, Compiled Mich. Laws, 1929 (Mason's 1940 Supp.), pages 315-357); Sec. 67 (embodied in Act No. 114 of the Michigan Public Acts of 1937, pages 180-183, and in Act No. 282 of the Michigan Public Acts of 1939, pages 540-545); Sec. 67a (added by Act No. 114 of the Michigan Public Acts of 1937, pages 180-183, and amended by Act No. 282 of the Michigan Public Acts of 1939, pages 540-545)	4
Michigan Public Acts of 1937, Act No. 114, pages 180-183	4
Michigan Public Acts of 1937, Act No. 155, pages 238-244, as amended by Acts Nos. 29, 244 and 329 of the Michigan Public Acts of 1939, pages 49, 453 and 848, respectively, and particularly Sections 9 and 10 of said Act No. 155	4
Michigan Public Acts of 1939, Act No. 282, pages 540-545	4
United States Code, Title 28, Section 344a	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION, A MICHIGAN CORPORATION,

Plaintiff and Appellant,

vs.

CITY OF BIRMINGHAM, A MUNICIPAL CORPORATION; THE COMMISSION OF THE CITY OF BIRMINGHAM; AND JOHN E. MARTZ (MAYOR) AND RAY A. PALMER, WILLIAM C. ALLEE, RALPH I. CORYELL, LUTHER HEACOCK, HARRY BISSETT AND WILMER E. MOODY (COMMISSIONERS), MEMBERS OF THE COMMISSION OF THE CITY OF BIRMINGHAM; AND ELMER W. HAACK, ASSESSOR OF THE CITY OF BIRMINGHAM; AND THEIR RESPECTIVE SUCCESSORS IN OFFICE,

Defendants and Appellees,

and

STATE OF MICHIGAN,

Intervening Defendant and Appellee.

STATEMENT OF BASIS OF JURISDICTION.

The appellant in the above entitled cause pursuant to rule No. 12 of the rules of the Supreme Court of the United States, files this its statement showing the basis upon which

it contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment of the Supreme Court of the State of Michigan in the above entitled cause.

I.

The statute believed to sustain appellate jurisdiction, is Section 344, Subdivision (a) of Title 28—Judicial Code and Judiciary, of the United States Code, as amended, which provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal.

II.

Appellant filed its petition in the Supreme Court of the State of Michigan on February 7, 1941, alleging that it was the holder of certain bonds issued by the Village (now City) of Birmingham, dated October 1, *1928*, in anticipation of the collection of special assessments made against Special Assessment District No. 146 in said village, and that the original assessments had proven insufficient to pay the outstanding bonds, and praying that a writ of mandamus be issued to the defendants, commanding them to proceed to make an additional assessment against the property in said special assessment district in an amount so that the collections therefrom would be sufficient to pay the principal and interest upon the outstanding bonds issued in anticipation of assessments against said special assessment district. The said cause was heard by the Supreme Court of the State of Michigan upon the said petition of the plaintiff, the answer of the defendants, the answer of the State of Michigan as intervenor, the reply of the plaintiff to said answers,

and the printed briefs and oral arguments of counsel. On the 30th day of June, 1941, two written opinions were filed in said cause by the members of the Supreme Court of the State of Michigan except Justices Butzel and McAllister who did not sit, holding that the plaintiff was not entitled to a writ of mandamus as prayed for in its petition, one of which opinions was written by Justice Chandler and the other by Justice Sharpe. 298 Mich. 314. Copies of said opinions are hereto attached, marked Exhibit A and made a part hereof. That on the 30th day of June, 1941, the following order was entered by the Supreme Court of the State of Michigan, to-wit:

> "This matter having been heard upon the petition of plaintiff, the answer of defendant, the answer of the intervening defendant, the reply of the plaintiff to said answers, and the briefs of counsel for the respective parties hereto, and due consideration thereof having been had by the Court, and it appearing to the Court upon such consideration that the writ of mandamus as prayed for by plaintiff ought not to be granted, it is hereby denied, but without costs to either party."

III.

That the Supreme Court of the State of Michigan is the highest court in the State of Michigan in which a decision in said suit could be had and the order above referred to, entered on the 30th day of June, 1941, was the final judgment of said court in said suit.

IV.

The application for an appeal from the aforesaid judgment of the Supreme Court of the State of Michigan to the Supreme Court of the United States, together with assignment of errors and this jurisdictional statement, was presented on the 24th day of September, 1941, to the Honorable

Edward M. Sharpe, Chief Justice of the Supreme Court of the State of Michigan.

V.

That in said cause there was drawn in question the validity of the following statutes of the State of Michigan; to-wit:

(a) Act No. 206 of the Michigan Public Acts of 1893, as amended (Vol. 1, Compiled Laws Mich. 1929, pages 1305-1412; Vol. 5, Compiled Laws Mich. 1929 (Masons 1940 Supp.), pages 315-357);

(b) The amendments to Section 67 of Act No. 206 of the Michigan Public Acts of 1893, which are embodied in Act No. 114 of the Michigan Public Acts of 1937 (pages 180-183) and in Act No. 282 of the Michigan Public Acts of 1939 (pages 540-545);

(c) Section 67 (a) of Act No. 206 of the Michigan Public Acts of 1893, which section was added by Act No. 114 of the Michigan Public Acts of 1937 (pages 180-183) and amended by Act No. 282 of the Michigan Public Acts of 1939 (pages 540-545);

(d) Act No. 114 of the Michigan Public Acts of 1937 (pages 180-183);

(e) Act No. 282 of the Michigan Public Acts of 1939 (pages 540-545);

(f) Act No. 155 of the Michigan Public Acts of 1937 (pages 238-244), as amended by Acts Nos. 29, 244 and 329 of the Michigan Public Acts of 1939 (pages 49, 453 and 848, respectively), and particularly Sections 9 and 10 of said Act No. 155;

in so far as the said statutes cancel plaintiff's right to a deficiency assessment for the payment of its bonds, on the ground that said statutes are repugnant to the Constitution of the United States as hereinafter more specifically set forth.

VI.

That the bonds issued by the Village of Birmingham in anticipation of the collections of special assessments against

Special Assessment District No. 146, were not the general obligation of said village, the obligation of said village being defined in said bonds in the following language:

> "The full faith and credit of the Village of Birmingham are hereby pledged for the punctual payment of the principal and interest of this bond from the special assessment fund created for the purpose, when the same shall have been collected." (Exhibit A—Plaintiff's petition.).

Section 15 of Chapter 21 of the charter of the Village of Birmingham, which section was in effect at the time of the issuance of the aforesaid bonds, was as follows:

> "Section 15. Should any special assessment prove insufficient to pay for the improvement or work for which it was levied, and the expenses incident thereto, the commission may make an additional pro rata assessment to supply the deficiency; and in case a larger amount shall have been collected than was necessary, the excess shall be refunded ratably to those by whom it was paid." (Paragraph XIII—Plaintiff's petition.)

The original special assessments did not produce sufficient moneys with which to pay all outstanding bonds (paragraph XI—Plaintiff's petition) because the owners of a large portion of the properties in said special assessment district failed to pay the assessments against such properties (Paragraph XII—Plaintiff's petition and Paragraph 4—Defendants' answer).

VII.

The plaintiff in its petition alleged that it was entitled to a deficiency assessment for the payment of its bonds by reason of the aforesaid charter provision. The defendants admitted the factual allegations in plaintiff's petition but alleged that a large percentage of the lots in said special assessment district "were offered for sale at the annual tax

sale for the year 1938 and bid in by the State of Michigan, and were not redeemed, whereby the title to said lots passed to the State of Michigan and said lots were offered for sale in accordance with the provisions of Act No. 155 of the Public Acts of 1937, as amended, and were purchased at public sale by the former owner thereof at the statutory minimum price of twenty-five per cent of the assessed valuation thereof" and "according to the tax laws of the State of Michigan all liens on lots so sold, including all taxes thereon, were cancelled"; and further that the defendants were advised and believed "that by the sale of said property for taxes and the cancellation of tax liens thereon, said lots in the hands of purchasers are not subject to further assessment for the improvement for which such district No. 146 was established and that the city commission has no power to levy such reassessment thereon". (Paragraphs 4, 5 and 6 of Defendant's answer.) Plaintiff, in its reply to the answers of the defendants and the intervening defendant, said in paragraph 5 thereof:

> "(5) Plaintiff, in further reply to the aforementioned answers, says that if Act No. 206 of the Public Acts of 1893, as amended, and Act No. 155 of the Public Acts of 1937, as amended, are to be construed as cancelling plaintiff's right to a reassessment under the provisions of the charter of the Village of Birmingham, then said acts to that extent are unconstitutional in that they impair the obligation of plaintiff's contract in violation of Section 9 of Article II of the Michigan Constitution and Section 10 of Article I of the Federal Constitution, and deprive plaintiff of its property without due process of law in violation of Section 16 of Article II of the Michigan Constitution and the 5th and 14th Amendments to the Federal Constitution."

The constitutional questions so raised in the pleadings were also argued in the original brief in the State Supreme Court

filed by the plaintiff (pages 22-25), in its reply brief to that filed by the defendants (pages 5-34) and in its reply brief to that filed by the Attorney General of the State of Michigan (pages 5-6).

Said constitutional questions were discussed in the opinion in said cause (298 Mich. 314) written by Justice Chandler and concurred in by the remaining five judges sitting in the case, in the manner hereinafter stated. On page 322 of said opinion the court said:

> "Plaintiff says that the additional assessment sought in this case has not yet been levied against the premises and therefore was not a lien when the state acquired title pursuant to the terms of the general tax laws, and hence was not extinguished. A contrary holding, argues plaintiff, would result in the impairment of contractual obligations."

Immediately following the above quotation, the court refers to its opinion in *Baker* v. *State Land Office Board*, 294 Mich. 587, and then states (page 323) that the court in that case "concluded that the statutes in question do not contravene the requirements of the state or federal constitution forbidding the impairment of the obligation of contracts". Said opinion concludes with this statement:

> "In a long and able opinion to which reference has been made the constitutionality of this legislation was upheld, and having determined that the right to make any further special deficiency assessments as well as actual assessments made are totally and completely extinguished and cancelled, it follows that the petitioner's demand for a writ of mandamus should be and is denied." (Page 327.)

VIII.

At the time of the issuance of plaintiff's bonds the general property tax law of Michigan, after providing for the is-

suance of tax deeds to the State of Michigan where property had been bid in to the State at a tax sale and still held by the State after a stated period of time (Section 3520, Michigan Compiled Laws, 1929), stipulated that

> "All taxes charged against such lands in the office of the Auditor General at the time they are deeded to the state shall be cancelled * * * and said lands so deeded as aforesaid shall not be liable to any assessment for any purpose until the same are again sold and deeded by the state, and notice of said sale and deeding given to the county treasurer by the Commissioner of the State Land Office, as hereinafter provided." (Section 3524, Michigan Compiled Laws, 1929.)

The above section has remained on the statute books without amendment since 1899. At the time of the issuance of plaintiff's bonds, the foregoing was the only statutory provision relative to the effect upon outstanding taxes and special assessments, of a tax deed to the State of Michigan.

Inasmuch as the deficiency assessment claimed by plaintiff has not yet been made, it therefore was not charged against the lands in the office of the Auditor General at the time such lands were deeded to the State of Michigan. Neither was such deficiency assessment a lien against such lands. *Mullen Benevolent Corporation* v. *United States*, 290 U. S. 89.

The basis upon which this action was defended and upon which it was decided by the Supreme Court of the State of Michigan, was that the aforementioned statutes adopted in the years 1937 and 1939 cancelled not only those special assessments which were liens against the property but also future deficiency assessments (Paragraphs 4, 5 and 6 of defendants' answer and 298 Mich. 314-330). The particular statutory provisions cited by the defendants and the court as such basis are the following:

(1) The language added to the form of decree of the Circuit Court as set forth in Section 67 of Act No. 206 of the Michigan Public Acts of 1893, as amended by Act No. 114 of the Michigan Public Acts of 1937 and Act No. 282 of the Michigan Public Acts of 1939, said added language being as follows:

> "It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and encumbrances, of whatever kind or nature, cancelled as of such date, unless any said parcel of land shall be redeemed as provided in act number 206 of the public acts of 1893, as amended, or unless an appeal shall have been taken as provided in act number 206 of the public acts of 1893, as amended, or unless any said parcel of land shall be redeemed by any political subdivision of the state as provided in act number 206 of the public acts of 1893, as amended, for redemption by any person."

(2) The provisions of Section 9 of Act No. 155 of the Michigan Public Acts of 1937 and of Section 10 of said act, as amended by Act No. 244 of the Michigan Public Acts of 1939, which in part are as follows:

> "Sec. 9. * * * Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any encumbrances, except as herein otherwise provided. * * *"

> "Sec. 10. All moneys received by the state land office board, * * * shall be credited to the general fund of the state, and shall be paid to the several tax assessing units, including municipalities collecting their own delinquent taxes, in proportion to the delinquent

taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any county treasurer or the department of conservation. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the state of Michigan."

After referring to the above acts on pages 323-325 of the opinion in this case as found in 298 Michigan, the court said:

"The clear import of the language of the foregoing amendatory enactments, and the obvious intent and purpose of the legislature to relieve owners from the weight of accumulated obligation, James A. Welch Co., Inc., *v.* State Land Office Board, 295 Mich. 85, must lead one to the conclusion that when title to the lots here in question became absolute in the State of Michigan upon expiration of the period of redemption provided by the tax law free of all taxes and other liens and incumbrances of whatever kind or nature, and future and deficiency as well as past assessments and taxes were cancelled. To hold otherwise would defeat the purpose of this remedial legislation by a narrow and unwarranted construction, and would once again give rise to the vicious circle of assessment based upon inflated valuation; refusal or inability of the owner to pay; followed by a sale of the premises pursuant to the State's sovereign power of enforcing the collection of taxes.

"It should be borne in mind that when the lots in question were sold for delinquencies, upon failure to redeem, the title vested absolutely in the State with power to dispose of them in any way not contrary to the Constitution. Upon resale by the State land office board, a new chain of title originated, evidenced by a quitclaim deed, 'free of any incumbrances.'" (Page 325.)

The means of enforcing an obligation is a part of the obligation itself, and the laws in force at the time and place of making a contract enter into and form a part of it. *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, and the cases therein cited.

At the time the bonds in question were issued the bondholder's remedy to enforce the payment of his bond was not confined alone to the collection of the original assessments but included his right to a deficiency assessment as provided in the village charter. This latter part of his remedy has been destroyed by subsequent legislation as construed by the Supreme Court of the State of Michigan in the present case. The admitted facts disclose that without a deficiency assessment, the outstanding bonds can not be paid (Paragraph XI—Plaintiff's petition. Admitted in Paragraph 1 of Defendants' answer) and there remains no adequate or efficacious means of enforcing plaintiff's bond contract. The courts have held far less drastic changes to be in violation of the constitutional provisions against the impairment of the obligation of contracts. The following are a few of such cases:

W. B. Worthen Co. v. *Kavanaugh*, 295 U. S. 56;
Borough of Fort Lee, N. J., v. *United States* (C. C. A., 3rd Cir.), 104 F. (2d) 275;
Brown-Crummer Inv. Co. v. *Paulter* (C. C. A., 10th Cir.), 70 F. (2d) 184;
Nelson v. *Pitts*, 126 Okla. 191 (53 A. L. R. 1137);
Moore v. *Branch* (Dist. Ct. S. D. Florida—Before Bryan, Circuit Judge, and Ritter and Strum, District Judges), 5 Fed. Supp. 1011.

"The power of taxation conferred by law entered into the obligation of contracts, and any subsequent legislation withdrawing or lessening such power, leaving

creditors without adequate means of satisfaction, impaired the obligation of their contracts within the meaning of the Constitution." *Hubert* v. *New Orleans*, 215 U. S. 170, 178, citing *Memphis* v. *U. S.*, 97 U. S. 293; *Van Hoffman* v. *City of Quincy*, 4 Wall. 535; *Seibert* v. *Lewis*, 122 U. S. 284; *Mobile* v. *Watson*, 116 U. S. 289; *Scotland County Court* v. *Hill*, 140 U. S. 41.

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476-7.

The following are additional authorities sustaining the jurisdiction of the Supreme Court of the United States:

(1) A proceeding for a writ of mandamus is a suit within the meaning of Section 344 of Title 28 of the United States Code.

American Express Company v. *Michigan*, 177 U. S. 404, 406.

(2) The Supreme Court of the United States has jurisdiction where a subsequent State law was challenged as impairing the obligation of a previous contract.

Millsaps College v. *City of Jackson*, 275 U. S. 129, 132.

Therefore, the appellant respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal.

BERRY & STEVENS,
CLAUDE H. STEVENS,
Attorneys for Plaintiff and Appellant,
1000 Penobscot Building,
Detroit, Michigan.

Dated: September 24, 1941.

Supplemental Statement.

Appellant's petition for appeal, its assignment of errors and its statement of basis of jurisdiction, were presented on the 24th day of September, 1941, to the Honorable Edward M. Sharpe, Chief Justice of the Supreme Court of the State of Michigan, who denied said petition, and on the 26th day of September 1941, appellant's petition for appeal, accompanied by its assignments of errors and statement of basis of jurisdiction, was presented to the Honorable Frank Murphy, Justice of the Supreme Court of the United States.

This supplemental statement is attached to and made a part of the foregoing statement of basis of jurisdiction.

BERRY & STEVENS,
CLAUDE H. STEVENS,
Attorneys for Plaintiff and Appellant,
1000 Penobscot Building,
Detroit, Michigan.

Dated: September 26, 1941.

EXHIBIT A.

SUPREME COURT, STATE OF MICHIGAN.

MUNICIPAL INVESTORS ASSOCIATION, *Plaintiff*,

vs.

CITY OF BIRMINGHAM, *et al.*, *Defendants*.

Before the Entire Bench—Except Butzel.

CHANDLER, *J.*:

Plaintiff is the holder of six $1,000 bonds numbered 12 to 17, inclusive, which were issued by the Village of Birmingham on October 1, 1928, as part of a series of 14 bonds of like denomination in anticipation of the collection of special assessments to be assessed against special assessment district No. 146, composed of 106 lots to be improved by a street-paving project. The Village of Birmingham reincorporated as the city of Birmingham in 1933, and the city assumed all of the debts and liabilities of the village including these bonds which bore interest at the rate of 5½ per cent, per annum, and matured on October 1st of the year indicated as follows: $4,000—1929; $3,000—1930; $4,000—1931; $3,000—1932; and $3,000—1933. In addition to the bonds which plaintiff holds, there are yet outstanding 3 of 4 bonds which were issued to refund the obligations maturing in 1931.

The special assessment district consisted of 18 lots in Birmingham Lincoln Lots subdivision and 88 lots in Birmingham Lincoln Lots resubdivision. The sum of $14,388.77, later reduced to $12,436.25, was levied against the resubdivision property, but nothing was ever paid thereon. An assessment of $3,405.81, later reduced to $2,942.61, was made against the subdivision premises, but payment was made on only 9 and a fraction lots.

A payment of $100 was made upon plaintiff's bonds on June 19, 1939, and upon the refunded obligations on November 28, 1939, leaving a principal amount of $8,100 due and owing, which with accrued interest to January 1,

1941, constitutes an outstanding indebtedness in excess of $11,800. The amount on hand in the assessment fund is $25.67.

All the lots in both subdivisions upon which assessments were levied but not paid were offered for sale at the annual tax sale for the year 1938 and bid in by the State of Michigan. Title passed to the State upon failure of the owners to exercise their right of redemption.

Alleging that no more than $2,000 will be received upon the assessments already made and moneys allocable to the assessment district by reason of the cancellation of special levies under the provisions of Act No. 155, Pub. Acts 1937, as amended (Comp. Laws Supp. 1940, Sec. 3723-1 to 3723-14, Stat. Ann. Sec. 7.951 et seq.), plaintiff instituted this action for a writ of mandamus to compel defendants to make an additional assessment, a demand for a reassessment of the property in the district in an amount sufficient to pay the principal and interest of the outstanding bonds having been denied by the defendant city commission.

Plaintiff argues that the officials of the city of Birmingham are required by charter to make an additional deficiency levy and that the sale of the property to the State under the general property tax laws and subsequent conveyance by the State under Act No. 155, Pub. Acts 1937, as amended, does not preclude such levy, for such sale affects only existing liens and not additional deficiency liens which were nonexistent at the time of sale. Defendants have assumed that it would have been the duty of the city commission to have levied additional deficiency assessments had there been no tax sale, but vigorously resist this proceeding upon the theory that they have been relieved of such duty and no longer have the power to levy further assessments by reason of the cancellation of taxes and assessments when absolute title to most of the lots in the district vested in the State and did not revive when the lots were repurchased by the former owner in accordance with the terms of Act No. 155, Pub. Acts 1937, subsequently amended by Acts Nos. 29, 244, and 329, Pub. Acts 1939, and the general property tax law, as amended by Acts Nos. 114 and 325, Pub. Acts 1937.

In the recent case of Baker *v.* State Land Office Board, 294 Mich. 587, 592-594, Justice McAllister described the background giving rise to the enactment of the foregoing statutes:

"Between the years 1920 and 1930 speculative activities in real estate in the State, unrestrained by normal caution and on a scale unparalleled, had resulted in platting subdivisions with building lots sold at highly inflated prices. The same exaggeration seeped into farm lands and business properties in cities. During this period municipalities and their officials encouraged the speculative movement by approval, in undeveloped areas, of widespread improvements, including sewer extensions, sidewalks, and pavements. The entire movement was pervaded by an enthusiasm uncolored by moderation. But all of these plans and hopes collapsed under the pitiless and inexorable advance of economic depression, of which this court has on several occasions taken judicial notice * * *."

"The result of this activity was that taxes on excessively high assessments became delinquent and accumulated in amount until they greatly exceeded the assessed valuation. For approximately six years subsequent to 1932, no tax sales were held; moratorium statutes were passed by the legislature embodying waiver of interest and penalty charges and providing for payment of taxes in instalments covering a 10-year period; but such efforts were in vain, and the unpaid taxes accumulated until in some counties they exceeded five times the amount of the assessed valuation of the property. Planning commissions, which occupied themselves with a possible solution of the problem, were appointed by the governor, and concluded that the various plans to remedy the situation had failed to stop the abandonment of tax delinquent land; and legislative committees made exhaustive studies in an effort to devise means of overcoming the rapidly growing peril which was assuming catastrophic form. The result was the enactment of Act No. 155, Pub. Acts 1937, and the amendment of the general property tax law by Acts Nos. 114 and 325, Pub. Acts 1937."

One cannot but conclude, considering the motivating force behind this legislation, that it was the answer of the legislature to the desperate problem of delinquent taxes based upon property valuation having no foundation in fact, and to clear away the debris left by an abnormally high tide of prosperity swept up by an irresistible current of speculation.

"The primary and inducing purpose of the legislation was to secure a portion of the unpaid taxes, rather than nothing, and to restore lands to a tax-paying basis, instead of supinely allowing them to accumulate tax delinquencies with no hope of ever recovering them." Baker *v.* State Land Office Board, *supra*, 606.

Pursuant to legislative intent the Michigan Supreme Court has held that a taxpayer may bring mandamus to compel a city to place on its tax rolls immediately all parcels of land sold under the "scavenger" act even though the State land office board had not as yet executed deeds or contracts to the successful bidder; that such lands are subject to taxation when a bid is accepted and notice of sale given by the agent of the board to the county treasurer who in turn is obliged to notify the proper assessing officers. Wilson *v.* City of Pontiac, 294 Mich. 79.

It is remedial legislation and is to be construed as such. Oakland County Treasurer *v.* Auditor General, 292 Mich. 58.

"In interpreting the act our duty is to ascertain the meaning of the statute, to give it full force and effect, coloring our construction by the purpose of its enactment. The statute is remedial and is entitled to a liberal construction. * * * It is said to be the duty of the court to draw inferences from the evident intent of the legislature, as gathered from a view of the law in its entirety; we must render effectual the specific things which are included in the broad and comprehensive items and purposes of the law." Wilson *v.* City of Pontiac, *supra*, 86.

Plaintiff says that the additional assessment sought in this case has not yet been levied against the premises and therefore was not a lien when the State acquired title pur-

quant to the terms of the general tax laws, and hence was not extinguished. A contrary holding, argues plaintiff, would result in the impairment of contractual obligations. In the Baker case supra, it was claimed that there was nothing in the title of the general property tax law as amended by Act No. 114, Pub. Acts 1937 (Comp. Laws Supp. 1940, Sec. 3459, Stat. Ann. 1940 Cum. Supp. Sec. 7.112),* to indicate that it covered the cancellation of past as well as future taxes and special assessments, or that municipalities which have borrowed in anticipation of the collection of taxes or issued special assessment bonds shall have such taxes and assessments cancelled. A review of the briefs filed in the Baker Case shows that counsel for plaintiff herein filed a brief amicus curiae in which many of the cases relied upon by plaintiff in the instant suit were cited. Notwithstanding the fact that the court had those cases before it, the argument made was repudiated upon the ground that it was unnecessary to include in the title the nature of the interest secured by the purchaser upon the sale, as well as the specific tax incumbrances from which the property was freed in such proceedings, and the court concluded that the statutes in question do not contravene the requirements of the State or Federal Constitution forbidding the impairment of the obligations of contract.*

"It is claimed that the statute destroys vested rights of municipalities to tax liens and assessments already assessed and levied, and destroys property and contract rights of individuals who have purchased bonds under the assumption of their payment through collection of the very taxes and assessments which the act cancels. In addition to our determination as above expressed, it can be said that such purchasers can be assumed to have purchased with knowledge that the lien upon the property securing such taxes and assessments might be displaced." Baker *v.* State Land Office Board, *supra*, 599.

That act, passed the same year as Act No. 155, Pub. Acts 1937, amended section 67 of Act No. 206, Pub. Acts 1893 (1 Comp. Laws 1929, Sec. 3459), and added the following sig-

nificant language to the decree to be entered upon the sale of property for tax delinquencies:

"'It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the State, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and incumbrances, of whatever kind or nature * * * cancelled as of such date. * * *'

"Upon the entering of the decree hereinbefore provided for, absolute title to the lands therein shall vest in the State of Michigan as provided in said decree."

Act No. 155, Sec. 9, Pub. Acts 1937, defining the authority of the State land office board to execute deeds and conveyances, reads in part as follows:

"Any quitclaim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any incumbrances, except as herein otherwise provided."

The exception referred to is not pertinent to this discussion.

Act No. 244, Pub. Acts 1939, which amended Act No. 155, Sec. 10, Pub. Acts 1937, provides for the division of the receipt of moneys by the State land office board "in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any county treasurer, or the department of conservation," and refers to the title acquired by the State in these words:

"Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the State of Michigan."

The clear import of the language of the foregoing amendatory enactments, and the obvious intent and purpose of the

legislature to relieve owners from the weight of accumulated obligation, James A. Welch Co., Inc., *v.* State Land Office Board, 295 Mich., 85, must lead one to the conclusion that when title to the lots here in question became absolute in the State of Michigan upon expiration of the period of redemption provided by the tax law free of all taxes and other liens and incumbrances of whatever kind or nature, and future and deficiency as well as past assessments and taxes were cancelled. To hold otherwise would defeat the purpose of this remedial legislation by a narrow and unwarranted construction, and would once again give rise to the vicious circle of assessment based upon inflated valuation; refusal or inability of the owner to pay; followed by a sale of the premises pursuant to the State's sovereign power of enforcing the collection of taxes.

It should be borne in mind that when the lots in question were sold for delinquencies, upon failure to redeem, the title vested absolutely in the State with power to dispose of them in any way not contrary to the Constitution. Upon resale by the State land office board, a new chain of title originated, evidenced by a quitclaim deed, "free of any incumbrances."

Said Justice Cooley in the early case of Sinclair *v.* Learned, 51 Mich. 335, 344:

"Every sale of lands under our tax system is a sale of the complete title; and if legal, all prior titles are cut off by it."

In the more recent case of Krench *v.* State of Michigan, 277 Mich. 168, 179, it is stated:

"The State held title in fee simple. The original title had come to an end and a new chain of title originated with the State. The deed to Lucinda Turner was no part of any statutory proceedings instituted for the purpose of foreclosing the interest of an original owner who had become delinquent in the payment of taxes. This should be kept in mind for it notes the distinction between sales calculated to cut off former ownership and that of vested ownership in the State. In the one instance the statute divests title in one

and vests it in another through tax foreclosure proceedings, while in the other a new title originates by deed from the State. The State, having title in fee, could like any other owner in fee, did with reservation of oil, gas and minerals. It needed no amendment to an inapplicable statute to enable the State, by legislative enactment, to establish a policy with reference to land owned by the State in fee. The deed to Lucinda Turner was not a taxsale deed but one upon bargain, with sale by the State, the owner in fee of the land, and such owner could and did sever the divisible fees."

The rule is reiterated in Rathbun *v.* State of Michigan, 284 Mich. 521, 539, in these words:

"By the foregoing provisions there can be no doubt that after the period for redemption of property bid off to the state for delinquent taxes, the State receives the absolute title to such lands, and in the instant case the State owned the absolute title to the lands in controversy prior to any of the transactions with J. F. Rathbun."

"Inasmuch as the State is the absolute owner of the lands, the legislature is empowered to provide for the sale thereof in any way not prohibited by the Constitution." Baker *v.* State Land Office Board, supra, 602.

See, also, Hoffman *v.* Otto, 277 Mich. 437.

The Legislative body of the State has determined in what manner lands owned by the State shall be sold. In a long and able opinion to which reference has been made the constitutionality of this legislation was upheld, and having determined that the right to make any further special deficiency assessments as well as actual assessments made are totally and completely extinguished and cancelled, it follows that petitioner's demand for a writ of mandamus should be and is denied.

No costs awarded, a public question being involved.

Sharpe, C. J., and Bushnell, Boyles, North, and Wiest, JJ., concurred with Chandler, J.

Sharpe, C. J.: I concur in the result reached by Mr. Justice Chandler. The paramount question involved in this

case may be stated as follows: Do the statutes here involved prevent reassessment on special assessment districts when the land in such districts has been bid in by the State at the tax sale and then resold under the so-called scavenger act?

Act No. 206, Sec. 67, Pub. Acts 1893, as last amended by Act No. 282, Pub. Acts 1939 (Comp. Laws Supp. 1940, Sec. 3459, Stat. Ann. 1940 Cum. Supp. Sec. 7.112), dealing with the decree to be entered upon the sale of property for tax delinquencies, provides:

"'It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the State, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and incumbrances, of whatever kind or nature, cancelled as of such date.' * * *

"Upon the entering of the decree hereinbefore provided for, absolute title to the lands therein shall vest in the State of Michigan as provided in said decree."

Act No. 155, Sec. 9, Pub. Acts 1937 (Comp. Laws Supp. 1940, Sec. 3723-9, Stat. Ann. 1940 Cum. Supp. Sec. 7.959), defining the authority of the State land office board to execute deeds and conveyances, reads as follows:

"Any quitclaim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any incumbrances."

Under the above authority, when the land is sold to the State for tax delinquencies, all incumbrances upon the land are discharged; and under the scavenger act, such land owned by the State is sold by it free of all incumbrances. Is the liability to reassessment an incumbrance within the meaning of these statutes? It is the general rule that a special assessment does not become an incumbrance until it has become a lien against the premises. See 72 A. L. R. 302; Jaques *v.* Tomb, 179 Calif. 444 (177 Pac. 280); Gemansky *v.* Fitch, 121 Iowa 186 (96 N. W. 754); Metropolitan Life Ins.

Co. *v.* Union Trust Co., 283 N. Y. 33 (27 N. E. 2d 225, 128 A. L. R. 370); Lindsay *v.* Eastwood, 72 Mich. 336.

In Post *v.* Campau, 42 Mich. 90, we said:

"Anything is an incumbrance which constitutes a burden upon the title; a right of way, Clark *v.* Swift, 3 Metc. (44 Mass.) 390, 392; a condition which may work a forfeiture of the estate, Jenks *v.* Ward, 4 Metc. (45 Mass.) 404, 412; a right to take off timber, Catheart *v.* Bowman, 5 Pa. 317; a right of dower, whether assigned or unassigned, Runnels *v.* Webber, 59 Me. 488. In short, 'every right to, or interest in the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance.' Prescott *v.* Trueman, 4 Mass. 627, 630-(3 Am. Dec. 246)."

Under the above definition of an incumbrance, it would naturally follow that the possibility of reassessment would constitute an incumbrance and thus be cancelled. Moreover, the city of Birmingham has no power or authority to levy a special assessment against the land while it is owned by the State of Michigan.

In People, ex rel. Auditor General, *v.* Ingalls, 238 Mich. 423, 425, we said:

"The doctrine has been pretty well settled in this State and elsewhere that property owned by the State or by the United States is not subject to taxation unless so provided by positive legislation. And municipalities and State agencies are included in this class when their property is used for public purposes. The reason which supports this doctrine is that, if taxes were permitted to be levied against the sovereign, it would be necessary to tax itself in order to raise money to pay over to itself. This would be an idle thing to do. And, besides, it is rather incongruous that the creature should have the right to tax its creator without its consent. Out of this reason has grown an implied presumption that the State is exempt from all taxes unless the one asserting it can point to some legislation in support of it. We are not aware of any law, nor has any been called to our attention, which authorizes the city of Detroit to levy any tax or assessment against State property. Unless it can

do this, its contention must fail. Again, if this tax can be levied against State property, who has authority to pay the tax, and, if it is not paid, who has authority to sell the land to pay the tax?''

The writ is denied.

Bushnell, Boyles, and North, JJ., concurred with Sharpe, C. J. Butzel, J., did not sit. McAllister, J., took no part in this decision.

(7447)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Plaintiff and Appellant,
vs.
CITY OF BIRMINGHAM, a Municipal Corporation, et al.,
Defendants and Appellees,
and
STATE OF MICHIGAN,
Intervening Defendant and Appellee.

BRIEF OF APPELLANT

CLAUDE H. STEVENS,
Attorney for Plaintiff and Appellant,
1000 Penobscot Building,
Detroit, Michigan.

BERRY & STEVENS,
Of Counsel.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

INDEX TO SUBJECT MATTER

	Page
I. Official report of opinions below	1
II. Jurisdiction	2-3
III. Statement of the case	4-10
(a) Nature of the proceedings and parties	4-5
(b) Establishment of special assessment district and issuance of bonds	5-6
(c) Outstanding bonds in default	6
(d) Defaults in payment of special assessments and sales under tax laws	6-8
(e) Charter provision re additional assessment	8
(f) Action in Michigan Supreme Court	9-10
IV. Specification of errors	11-13
V. Argument	14-47
Summary	14
Point 1—Plaintiff's contractual right to an additional assessment	15-20
Point 2—Under laws existing when plaintiff's bonds were issued, acquisition of title by the state under the tax laws would not have destroyed plaintiff's right to an additional assessment	21-25
Point 3—The 1937 and 1939 legislation cancelled plaintiff's contractual right to an additional assessment	26-28
Point 4—The 1937 and 1939 legislation is repugnant to the contract clause of Section 10 of Article I of the Constitution of the United States	29-46

Page

Point 5—The 1937 and 1939 legislation is repugnant to the due process clauses of the 5th and 14th amendments to the Constitution of the United States..... 47

IV. Conclusion..... 48

TABLE OF CASES CITED

Alcona Co. Supervisors v. Auditor General, 136 Mich. 130..... 22

American Express Co. v. Michigan, 177 U. S. 404 2

Atwood, et al. v. Kelley, et al., 127 S. W. (2d) 555 43

Auditor General v. Maier, 95 Mich. 127..... 7, 21

Baker v. State Land Office Board, 294 Mich. 587.... 43, 45

Board of Education of the City of Lincoln Park v. Board of Education of the City of Detroit, 245 Mich. 411..... 43

Borough of Fort Lee v. U. S., 104 Fed. (2d) 275... 42

Brown-Crummer Inv. Co. v. Paulter, 70 Fed. Rep. (2d) 184..... 42

Case v. City of Saginaw, 196 Mich. 687..... 23

Corliss v. Village of Highland Park, 132 Mich. 152 16

Dallas Co. Levee Imp. Dist. No. 6 v. Rugel, 36 S. W. (2d) 188..... 42

Gelfert v. National City Bank, 313 U. S. 221..... 40

Hamilton v. Regents of the University of California, 293 U. S. 245..... 3

Hendrickson v. Apperson, 245 U. S. 105..... 34

Home Bldg. & L. Asso. v. Blaisdell, 290 U. S. 398 38, 41, 44

In re Cranberry Creek Drainage District, 231 N. W. 588 43

In re Dancy Drainage District, 190 Wis. 327, 208 N. W. 479..... 18

	Page
In re Special Assessments for Paving District No. 3 in the City of Golden, 95 Pac. (2d) 806	42
Islais Co., Limited v. Matheson, 45 Pac. (2d) 326	42
Kadow v. Paul, 274 U. S. 175	17, 29
Louisiana ex rel. Hubert, Receiver, v. City of New Orleans, 215 U. S. 170	34
Louisiana v. New Orleans, 102 U. S. 203	33
Louisiana v. Pillsbury, 105 U. S. 278	33
Lynch v. United States, 292 U. S. 571	47
Millsaps College v. City of Jackson, 275 U. S. 129	3
Mobile v. Watson, 116 U. S. 289	33
Moore v. Branch, 5 Fed. Supp. 1011	42
Mullen Benevolent Corp. v. U. S., 290 U. S. 89	23, 27
Municipal Investors Association v. Birmingham, 298 Mich. 314	26
Nelson v. Pitts, 126 Okla. 191, 53 A. L. R. 1137	42
People ex rel. Equitable Life Assur. Soc. of U. S. v. Pierce, 176 N. Y. Supp. 412	42
Ralls County Court v. United States, 105 U. S. 733	33
Read v. Beczkiewicz, 18 N. E. (2d) 789	42
Seibert v. Lewis, 122 U. S. 284	33
Senn v. Tile Layers Protective Union, 301 U. S. 468	3
State ex rel. Frazer v. Holt County Court, 135 Mo. 533, 375 S. W. 521	18
State ex rel. Sherrill v. Milam, 153 So. Rep. 100	42
State of Louisiana v. City of New Orleans, 102 U. S. 203	33
State v. Port of Palm Beach District, 164 So. 851	42
Straughn v. Berry, 65 Pac. (2d) 1203	42
Thompson v. Auditor General, 261 Mich. 624	43
Treigle v. Acme Homestead Association, 297 U. S. 189	47
Von Hoffman v. City of Quincy, 4 Wall. 535	33
Wolff v. City of New Orleans, 103 U. S. 358	33, 34
Wood et al. v. Lovett, 313 U. S. 362	40
W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56	34, 35, 37, 39

INDEX TO CITATIONS TO CONSTITUTION, STATUTES, CHARTERS AND TEXT BOOKS

United States Constitution

	Page
Article I, Section 10	3, 11, 14, 46
5th and 14th amendments	3, 14, 47

United States Statutes

Title 28, Section 344, U. S. C. A.	2

Michigan Compiled Laws 1929

Section 1763 et seq.	4
Section 1786	15
Section 2228 et seq.	4
Section 3389 et seq.	2
Section 3446	7
Section 3448	25
Section 3462	30
Section 3500	21
Section 3523	21
Section 3524	22, 28
Section 3536	30

Michigan Compiled Laws Supplement 1940

Section 2250	5
Section 3389 et seq.	2
Section 3446	7
Section 3451	7, 30
Section 3459	2, 26
Section 3459 and 3459-1	7

Page

Section 3462..... 7, 30
Section 3467..... 7
Section 3723-1 to 3723-14..... 2, 7
Section 3723-7..... 8
Section 3723-9..... 2, 8, 12, 26
Section 3723-10..... 2, 8, 12, 26

Michigan Public Acts

Act No. 206, Public Acts, 1893, as amended..... 2, 11
Act No. 206, Public Acts, 1893 (Section 67)..... 26
Act No. 206, Public Acts, 1893 (Section 127)..... 21
Act No. 206, Public Acts, 1893 (Section 130)..... 22, 24
Act No. 278, Public Acts, 1909, as amended..... 4
Act No. 278, Public Acts, 1909 (Section 24)..... 15
Act No. 279, Public Acts, 1909, as amended..... 4
Act No. 10, Public Acts, 1932 (First Extra Session) 30
Act No. 142, Public Acts, 1935..... 40
Act No. 114, Public Acts, 1937..... 2, 11, 26
Act No. 155, Public Acts, 1937, as amended 2, 7, 9, 12, 26, 30
Act No. 155, Public Acts, 1937 (Section 9)..... 26, 27
Act No. 155, Public Acts, 1937 (Section 10)..... 26, 27
Act No. 283, Public Acts, 1937..... 30
Act No. 29, Public Acts, 1939..... 2, 12
Act No. 244, Public Acts, 1939..... 2, 12, 26, 27
Act No. 282, Public Acts, 1939..... 2, 11, 26
Act No. 329, Public Acts, 1939..... 2, 12

Charters

Section 15, Chapter XXI, Village Charter..... 2, 8, 15
Section 22, Chapter XX, Village Charter..... 5

Text Books

25 R. C. L. 770-1..... 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION, a Michigan Corporation,
Plaintiff and Appellant,

vs.

CITY OF BIRMINGHAM, a Municipal Corporation; THE COMMISSION OF THE CITY OF BIRMINGHAM; and JOHN E. MARTZ (Mayor) and RAY A. PALMER, WILLIAM C. ALLEE, RALPH I. CORYELL, LUTHER HEACOCK, HARRY BISSETT and WILMER E. MOODY (Commissioners), Members of the Commission of the City of Birmingham; and ELMER W. HAACK, Assessor of the City of Birmingham; and their respective successors in office,
Defendants and Appellees,

and

STATE OF MICHIGAN,
Intervening Defendant and Appellee

BRIEF OF APPELLANT

I.

OFFICIAL REPORT OF OPINIONS BELOW

This is an appeal from an order entered by the Supreme Court of the State of Michigan on June 30, 1941, denying to Plaintiff a Writ of Mandamus, which order was based upon opinions reported in 298 Michigan 314-330.

II.

JURISDICTION

The Appellant claims that this Court has jurisdiction under Title 28, Section 344, U.S.C.A., because of the following:

1. The order from which this appeal has been taken is a final judgment of the Supreme Court of the State of Michigan (the highest Court in that state in which a decision in the suit could be had), a proceeding for a Writ of Mandamus being a suit within the meaning of said section. *American Express Co. v. Michigan*, 177 U. S. 404, 406.

2. In said suit there was drawn in question the validity of certain 1937 and 1939 statutes of the State of Michigan (*) which as interpreted by the Supreme Court of that state cancel the contract right (**) of the plaintiff as the

---

*The statutes, the constitutionality of which are questioned in this litigation, are the following in so far as they cancel plaintiff's right to an additional assessment under Section 15, Chapter XXI of the charter of the Village of Birmingham, to-wit:

(a) Act No. 206, Pub. Acts 1893, as amended, being the general property tax law of Michigan (1 Comp. Laws, 1929, Sections 3389 *et seq.* and Comp. Laws Supp. 1940, Sections 3389 *et seq.*) and particularly the amendments to Section 67 thereof embodied in Act No. 114, Pub. Acts, 1937 and Act No. 282, Pub. Acts, 1939 (Comp. Laws Supp. 1940, Section 3459).

(b) Act No. 155, Pub. Acts, 1937, as amended by Acts Nos. 29, 244 and 329, Pub. Acts, 1939, (Comp. Laws Supp. 1940, Sections 3723-1 to 3723-14) and particularly Sections 9 and 10 thereof (Comp. Laws Supp. 1940, Sections 3723-9 and 3723-10).

For a recital of the particular provisions see pages 11-12 of this brief.

**See Section 15, Chapter XXI of Village of Birmingham charter (R. 6).

holder of special assessment bonds, to an additional assessment to pay its bonds, said additional assessment being necessary because of the non-payment of a large part of the original assessments. The alidity of said statutes was questioned on the gro[illegible] of their being repugnant to the Constitution of th[illegible] United States, to-wit: that portion of Article 1, Section 10, prohibiting state laws impairing the obligation of contracts, and the 5th and 14th amendments prohibiting the taking of property without due process of law. Said constitutional questions were raised in the Plaintiff's Reply (R. 17-18), argued in the various briefs (Jur. Stat. 7) and decided by the Michigan Supreme Court (R. 22, 25).

3. The decision of the Michigan Supreme Court was in favor of the validity of said statutes.

4. The questions involved in this appeal are of a substantial nature. *Hamilton v. Regents of the University of California,* 293 U. S. 245, 258; *Senn v. Tile Layers Protective Union,* 301 U. S. 468, 476-7.

For a more detailed statement see jurisdictional statement heretofore filed and printed.

The only jurisdictional matters which would admit of argument are as to the [illegible]bstantial nature of the above constitutional questions, a discussion of which questions will take place later in this brief. This Court on December 15, 1941, ordered that further consideration of the question of jurisdiction be postponed until the hearing of the case on the merits. If the 1937 and 1939 state legislation did violate the contract and due process clauses of the Federal Constitution, then of course, this Court has jurisdiction. *Millsaps College v. City of Jackson,* 275 U. S. 129, 132.

III.

STATEMENT OF THE CASE

The Plaintiff as the holder of six defaulted bonds issued by the Village (now City) of Birmingham, Michigan, (R. 5) and payable solely from the collection of special assessments against lands in Special Assessment District No. 146 (R. 4, 9), filed its petition in the Supreme Court of the State of Michigan praying for a Writ of Mandamus to compel Defendants to levy an additional special assessment against said district to supply a deficiency in the funds available for the payment of its bonds. The facts are not in dispute and are set forth in the pleadings, upon which the case was heard in the state Court. The original Defendants are the City of Birmingham and the various officers who would be involved in the procedure for the levying of a deficiency special assessment. The Intervening Defendant is the State of Michigan which intervened through its Attorney General "in order to protect the interest of the State in the parcels of land involved" (R. 14). The Michigan Supreme Court on June 30, 1941, entered an order denying to plaintiff a Writ of Mandamus, from which order the appeal has been taken.

The Defendant, City of Birmingham, is a so-called Home Rule City operating under the provisions of Act No. 279, Pub. Acts, 1909, as amended, (1 Comp. Laws, 1929, Sections 2228 *et seq.*) and a charter adopted by the electors of said city on April 3, 1933 (R. 2). It succeeded the former Village of Birmingham which was a so-called Home Rule Village operating under the provisions of Act No. 278, Pub. Acts, 1909, as amended (1 Comp. Laws, 1929, Sections 1763 *et seq.*) and a charter adopted by the electors of said village on October 25, 1917 (R. 3). Upon the re-incorporation of the Village of Birmingham as the

City of Birmingham the latter assumed all the debts and liabilities of said village, both by reason of the terms of the city charter (R. 7) and the provisions of the City Home Rule Act (Comp. Laws Supp. 1940, Section 2250).

In 1928 the Village of Birmingham took procedings for the paving of portions of Washington Boulevard, Northlawn Drive and Southlawn Drive and assessed 23.4% of the cost thereof against the Village at large and 76.6% of such cost, or $17,742.10, against property in Special Assessment District No. 146. The amount so assessed against the district was made payable in 5 equal annual installments, the first installment becoming due in 1928 and the last installment in 1932 (R. 3).

The Village issued bonds in anticipation of the collection of these special assessments against the property in the special assessment district, in the principal sum of $17,000.00, dated October 1, 1928, bearing interest at 5½% per annum and maturing as follows: $4,000.00 on October 1, 1929, $3,000.00 on October 1, 1930, $4,000.00 on October 1, 1931, $3,000.00, on October 1, 1932, and $3,000.00 on October 1, 1933 (R. 3-4). The said bonds were payable solely from the collection of the special assessment against which they were issued. They were not an obligation of the village at large. The bonds themselves contained the following provision:

> "The full faith and credit of the Village of Birmingham are hereby pledged for the punctual payment of the principal and interest of this bond from the special assessment fund created for the purpose, when the same shall have been collected" (R. 9).

Section 22 of Chapter XX of the Village charter contained the following provisions relative to special assessment bonds, to-wit:

"Such bonds shall draw interest not exceeding six per cent per annum, as the commission may determine, and shall be payable out of the special assessment district fund when the assessment is collected" (R. 4).

Bonds Nos. 1 to 7, both inclusive, of said issue have been paid. Bonds Nos. 8 to 11, both inclusive, which matured on October 1, 1931, were refunded by refunding bonds Nos. 1 to 4, both inclusive, aggregating $4,000.00, dated October 1, 1931, and maturing in the years 1932 to 1935, both inclusive (R. 4). Bond Nos. 12 to 17, both inclusive of said original issue are still outstanding as are also bonds Nos. 1, 2 and 4 of said refunding issue, or a total of 9 bonds with an original par value of $9,000.00. $100.00 has been paid upon the principal of each of these bonds leaving the principal amount of $900.00 due upon each bond, or a total of $8,100.00, together with $3,675.23 of accrued interest as of January 1, 1941, or a total of $11,775.23. (R. 4). The amount on hand in the Special Assessment Fund is $25.67 and it is undisputed that future receipts from all sources (exclusive of a deficiency special assessment), will not exceed $2,000.00 (R. 5-6), an amount considerably less than the outstanding obligations.

Special Assessment District No. 146 was constituted of 88 lots in Birmingham Lincoln Lots Resubdivision and 18 lots (counting the West 75 feet of lots 85 and 86 as one) in Birmingham Lincoln Lots Subdivision (R. 6). Against the 88 lots in Birmingham Lincoln Lots Resubdivision $14,388.77 was assessed, none of which was ever paid. Against the 18 lots in Birmingham Lincoln Lots Subdivision $3,405.81 was assessed, which assessments were paid on nine and a fraction lots (R. 6).

Under the charters of both the former Village of Birmingham and the City of Birmingham delinquent

special assessments were returned to the County Treasurer and thereafter were subject to the provisions of the general tax laws of the state in respect to the collection thereof and also in respect to the sale and redemption of property for the non-payment thereof (R. 5). For statutory provisions governing return of delinquent taxes to County Treasurer, see 1 Comp. Laws 1929, Section 3446 and Comp. Laws Supp. 1940, Section 3446.

All of the 88 lots in Birmingham Lincoln Lots Resubdivision and the eight and a fraction lots in Birmingham Lincoln Lots Subdivision, upon which the assessments were not paid, were offered for sale at the annual tax sale in the month of May in the year 1938 and were bid in to the State of Michigan for lack of any other bid (R. 13). (Comp. Laws Supp. 1940, Section 3451 and 3462). These lots were not redeemed from such sale within the 18 months' redemption period, (Comp. Laws Supp. 1940, Section 3467) whereupon the title to said lots passed to the State of Michigan on November 3, 1939 (Comp. Laws Supp. 1940, Sections 3459 and 3459-1). Said lots were later offered for sale in accordance with the provisions of Act No. 155 of the Public Acts of 1937, as amended (Comp. Laws Supp. 1940, Sections 3723-1 to 3723-14) (*)

*Act 155, Pub. Acts, 1937, created the State Land Office Board and gave it jurisdiction over such lands as are located in the southern half of the lower peninsula, the title to which become vested in the State of Michigan by virtue of tax sales. The act provided that beginning on February 1st following the expiration of the period of redemption (at which expiration title vested in the state), the State Land Office Board should sell the lands so acquired by the state to the highest bidder at not less than 25% of the assessed valuation as fixed at the last assessment for the year preceding the vesting of title in the state. The act gave persons having an interest in such lands at the time of the tax sale, the right to meet any accepted bid within thirty days thereafter and also the right to purchase upon contract with

and were all purchased at the statutory minimum price of 25% of their assessed valuation (Comp. Laws Supp. 1940, Sections 3723-7), and (with a possible exception of 6 lots in the Birmingham Lincoln Lots Subdivision, which the State of Michigan alleges were sold to strangers to the title (R. 14-15) were sold to the former owners thereof (R. 13), i.e., those who held an interest in such lands at the time of the tax sale in 1938.

Section 15 of Chapter XXI of the charter of the Village of Birmingham, which was the charter in force at the time of the issuance of the bonds in question, contained the following provision:

> "Section 15. Should any special assessment prove insufficient to pay for the improvement or work for which it was levied, and the expenses incident thereto, the Commission may make additional pro rata assessment to cover the deficiency; and in case a larger amount shall have been collected than was necessary, the excess shall be refunded ratably to those by whom it was paid" (R. 6).

On January 20, 1941, a demand was made on behalf of Plaintiff upon the City Commission for an additional assessment against the lands in Special Assessment

---

installments to be paid over a period not to exceed ten years. Section 9 of the act provides that "any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any incumbrances except as herein otherwise provided" (Comp. Laws Supp. 1940, Section 3723-9). Section 10 provides that money received from sales under the act "shall be paid to the several tax assessing units. * * * in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, * * *. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the State of Michigan" (Comp. Laws Supp. 1940, Section 3723-10).

District No. 146 in an amount sufficient to pay the principal and interest on the outstanding bonds pertaining to said special assessment district (R. 7, 10). This demand was denied by resolution of said City Commission (R. 11). The Plaintiff on February 7, 1941, filed its petition in the Supreme Court of the State of Michigan praying for a Writ of Mandamus against the Defendants commanding them to make an additional assessment against Special Assessment District No. 146 in an amount sufficient to pay the principal and interest on the outstanding bonds pertaining to said district. The Defendants filed their Answer admitting the various facts set forth in the petition but interposed the legal defense that the major portion of the lots in the special assessment district were not subject to an additional assessment; that said lots had been sold to the state at the 1938 tax sale, were not redeemed within the 18 months' redemption period, and were then sold by the state under the provisions of Act No. 155, Pub. Acts, 1937, as amended, as a result of which the right to an additional assessment had been cancelled by the terms of the statutes governing such sales (R. 13).

Later in the proceedings the State of Michigan through its Attorney General intervened and filed an answer setting forth substantially the same legal defense as that set forth by the original Defendants (R. 14-17).

It was the claim of the Plaintiff in the Michigan Supreme Court that the 1937 and 1939 legislation upon which the above defense was based, and which changed the pre-existing law, was unconstitutional under the contract and due process clauses of both the State and Federal Constitutions, in so far as it cancelled Plaintiff's right to an additional assessment for the payment of its bonds, said right having been given by the Village charter which was

a part of the 1928 bond contract. For particular allegations of unconstitutionality, see R. 18.

On June 30, 1941, the Supreme Court of the State of Michigan handed down two opinions, one written by Mr. Justice Chandler and concurred in by the five remaining Justices who heard the case, and a second opinion written by Mr. Justice Sharpe and concurred in by four of the five remaining Justices. These opinions are reported in 298 Michigan, 314-330. The Court construed the 1937 and 1939 acts in question as cancelling the city's power to make an additional special assessment to cover fund deficiencies, and held that as so interpreted, said acts were constitutional. Thereupon an order was entered on the same date denying a Writ of Mandamus (R. 28).

IV.

SPECIFICATION OF ERRORS

Appellant, without intention of waiving any of the errors heretofore assigned by it (R. 32-35) but for the purpose of simplifying and combining such assignments, sets forth the following as its specification of errors:

(1) The Supreme Court of the State of Michigan erred in entering its order of June 30, 1941 denying to Plaintiff a Writ of Mandamus as prayed, for the reason that such denial was based upon certain Michigan statutes enacted in the years 1937 and 1939 which, as interpreted by that Court, cancel Plaintiff's contractual right to an additional assessment under a charter provision existing at the time of the issuance of Plaintiff's bonds, and therefore are unconstitutional in so far as they cancel such right, in that they impair the obligation of Plaintiff's contract contrary to the provisions of Section 10 of Article I of the Constitution of the United States and deprive Plaintiff of its property without due process of law contrary to the provisions of the 5th and 14th amendment to said Constitution, the said statutes being

(a) those portions of Act No. 114, Pub. Acts, 1937, and Act No. 282, Pub. Acts, 1939, which amended Section 67 of Act No. 206, Pub. Acts, 1893, by adding the following language to the court decree ordering a tax sale, to-wit:

> "It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and encumbrances, of whatever kind or nature, cancelled as of such date, unless

any said parcel of land shall be redeemed as provided in act number 206 of the public acts of 1893, as amended, or unless an appeal shall have been taken as provided in act number 206 of the public acts of 1893, as amended, or unless any said parcel of land shall be redeemed by any political subdivision of the state as provided in act number 206 of the public acts of 1893, as amended, for redemption by any person." (Comp. Laws Supp. 1940, Section 3459).

(b) Act No. 155, Pub. Acts, 1937, as amended by Acts Nos. 29, 244 and 329, Pub. Acts, 1939, and particularly Sections 9 and 10 thereof (Comp. Laws Supp. 1940, Sections 3723-9 and 3723-10) which in part are as follows:

"Sec. 9. * * * Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any encumbrances, except as herein otherwise provided. * * *"

"Sec. 10. All moneys received by the state land office board, * * * shall be credited to the general fund of the state, and shall be paid to the several tax assessing units, including municipalities collecting their own delinquent taxes, in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any county treasurer or the department of conservation. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the state of Michigan."

(Assignments of Error Nos. 1, 3, 4, 5, 6 and 7.)

(2) The Supreme Court of the State of Michigan erred in holding that the above mentioned acts in so far as

they cancelled Plaintiff's contract right to an additional assessment, were constitutional and were not repugnant to the aforesaid provisions of the Constitution of the United States. (Assignments of Error Nos. 1, 3, 4, 5, 6, 7.)

(3) The Supreme Court of the State of Michigan erred in refusing to hold that the above mentioned statutes in so far as they cancelled Plaintiff's right to an additional assessment, were unconstitutional as being repugnant to the aforesaid provisions of the Constitution of the United States. (Assignment of Error Nos. 2, 3, 4, 5, 6.)

V.

ARGUMENT

Summary of Argument

The sole question in this case is as to the constitutionality of the 1937 and 1939 legislation upon which the Michigan Supreme Court based its decision. Appellant's argument as to the constitutionality of such legislation will be developed under the following headings:

(1) Plaintiff has a contract right to an additional assessment to pay its bonds.

(2) Under legislation existing in 1928, the acquisition by the State of Michigan of the absolute title to lands under the tax laws and the subsequent conveyance by the state to a purchaser, would not have destroyed plaintiff's right to an additional assessment to pay its bonds.

(3) The 1937 and 1939 legislation as interpreted by the Michigan Supreme Court, cancels plaintiff's contractual right to an additional assessment to pay its bonds.

(4) The 1937 and 1939 legislation is in violation of that part of Section 10 of Article I of the Constitution of the United States which provides that no state shall pass any law impairing the obligation of contracts.

(5) The 1937 and 1939 legislation is in violation of the 5th and 14th amendments to the Constitution of the United States which prohibit the taking of property without due process of law.

POINT 1

Plaintiff has a contract right to an additional assessment to pay its bonds.

The bonds held by Plaintiff were issued by the Village of Birmingham in the year 1928 (R. 3, 9). These bonds were strictly special assessment bonds, that is, they bear no general obligation of the village (R. 4, 9). They must be paid entirely from special assessments.

Section 24 (1 Comp. Laws, 1929, Section 1786) of Act 278, Pub. Acts, 1909 (Village Home Rule Act) under which the Village of Birmingham was operating at the time of the issuance of Plaintiff's bonds (R. 3), provides in part as follows:

> "Sec. 24. Each village may in its charter provide: * * * (e) for assessing and reassessing the cost, or any portion thereof, of any public improvement to a special district; * * *."

The charter authority to assess the cost of the particular improvement against Special Assessment District No. 146 and to issue bonds in anticipation of the collection thereof is alleged in paragraphs 5 and 6 of Plaintiff's petition (R. 3-4) and admitted in the answer of the Defendants (R. 12) and in the answer of the Intervening Defendant (R. 14).

Section 15 of Chapter XXI of the charter of the Village of Birmingham, which was the charter in effect at the time of the issuance of Plaintiff's bonds, was as follows:

> "Section 15. Should any special assessment prove insufficient to pay for the improvement or work for which it was levied, and the expenses incident thereto, the Commission may make an additional pro rata assessment to supply the deficiency; and in case a larger amount shall have been collected than was necessary, the excess shall be refunded ratably to those by whom it was paid" (R. 6).

It is under the above provision that the Plaintiff claims the right to an additional assessment against the lands in the special assessment district, to supply the deficiency resulting from the non-payment of the original assessments by a portion of the property owners, most of whom have taken advantage of the 1937 and 1939 legislation by repurchasing the property at 25% of the 1938 assessed valuation (R. 13-15) and now claim immunity from any further assessment.

The word "may" used in the above quoted section of the village charter has the same effect as the word "shall," under the well-established rule that "the word 'may' in statutes conferring power upon public officers or official boards or tribunals may be so construed as to be the equivalent of the words 'shall' or 'must' where the public or individuals have an interest in the exercise of the powers conferred." 25 R. C. L. 770-1. The above rule was applied by the Michigan Supreme Court in the case of *Corliss v. Village of Highland Park*, 132 Mich. 152, where that court on page 160 of the opinion said:

> "It is no new doctrine that municipalities will be compelled to do that which their charters give them power to do. Where the law provided that the board of supervisors of a county owing debts which its current revenue was not sufficient to pay 'may, if deemed advisable, levy a special tax not to exceed in any one year one per cent. upon the taxable property,' etc., it was held that the law was mandatory, although permissive in form; that it was the legal duty of the corporation to levy the tax; and that, whenever the public interest or individual rights called for the exercise of this power, courts would compel action. *Supervisors v. United States*, 4 Wall. 435. It was also held in a case very similar to the one now before us that it was the duty of the city to proceed with a new assessment." (Citing *People v. City of Pontiac*, 185 Ill. 437, 445 (56 N. E. 1114)).

The position of the Defendants in respect to the duty upon the part of the City of Birmingham to levy an additional assessment had not the 1937 and 1939 legislation been enacted, is stated on page 319 of the opinion in the following language:

> "Defendants have assumed that it would have been the duty of the city commission to have levied additional deficiency assessments had there been no tax sale * * *."

In *Kadow v. Paul,* 274 U. S. 175, this court had before it for consideration the constitutionality of that part of the Washington diking law which provided for a supplemental assessment to cover a deficiency caused in the original assessment by reason of the non-payment of a part thereof. The opinion in that case concluded with the following language on page 181:

> "Supplemental assessments in providing for the payment for such improvements are recognized as a legitimate part of the proceeding necessary to raise the money and to pay bonds issued to meet the cost and if in the process of collection it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising to be included in another assessment is only meeting the to be expected cost of the improvement. When the operation of the law works uniformly as against all parts of the assessment district and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs as long as their benefits continue respectively to exceed their individual assessments."

This court has therefore recognized the legality and necessity of supplemental assessments to pay bonds where some of the original assessments have not been paid.

In *State ex rel. Frazer v. Holt County Court,* 135 Mo. 533 (375 S. W. 521), the plaintiff was granted a writ of mandamus to compel the defendant to levy an additional assessment. The deficiency arose as the result of the non-payment of assessments. The court on pages 545 and 546, said:

> "Neither the relator nor his assignor had anything to do with the matter of the estimate, the assessment, the levy or collection of the tax, and to hold that he is without a remedy and must go unpaid because of a miscalculation or mistake of the county court, or the dereliction and indifference of the collector, or the dodging of the taxpayer, is a proposition that ought to contain its refutation in its mere utterance.
>
> "All the lands benefited can be retaxed whenever it appears that previous assessments are insufficient. Even if the assessment in the first instance was sufficient, if collected, to pay the cash in full, for said improvements, yet if after the allowance of a reasonable time for the collection from delinquents, a deficiency exists, and the legal remedies have been exhausted for the collection of taxes, or if the assessments made have been abandoned or remain uncollected, by the authorities having the matter of the collection in charge, the writ should be granted ordering an additional assessment."

In re Dancy Drainage District, 190 Wis. 327 (208 N. W. 479), the situation was similar to that of the present case. In the Dancy case assessments for construction were levied in amount sufficient, if paid in full, to discharge the principal and interest of the bonds but owing to the fact that assessments against many of the lands in the district remained unpaid and the county had taken tax certificates on such lands, funds enough had not been collected to pay the amount due petitioners on their bonds. At the time

of the issuance of the bonds involved in that case, the statute authorized a reassessment to pay interest only but subsequently the statute was extended to include principal also. The following quotations from the decision in that case indicate that the power to levy additional assessments for the payment of principal on bonds existed even prior to the amendment. The court on pages 332-333 said:

> "When it is borne in mind that, in an area as large as the ordinary drainage district and including lands of very different values and very differently benefited, non-payment of assessments is almost certain to occur, it will be seen that some scheme for making up the deficit occasioned by such non-payment must exist in order to collect the amount due on outstanding bonds where, as here, they equal ninety-five per cent of the first total cost of construction.
>
> "Another fact must be borne in mind also, and that is that bonds issued nearly up to the total assessment for construction, as they usually are because the district has no money except as it is raised by assessments, would not be salable in the market, for there would be no adequate margin of security. For these reasons it is apparent that the legislative scheme, whether so in terms expressed or not, must have included the right to additional assessments up to the limit placed by the assessment of benefits for the payment of principal and interest due on lawful debts incurred by the district. That in terms is the scheme since the amendment of 1913 to sub. (1), Sec. 89.44."

In answer to an argument that a further assessment would be inequitable, the court on page 336 said:

> "It is also urged that it is inequitable to levy further assessments because those who pay will

have to pay more than their share—some not having paid at all. This is true, but it is a species of inequity that exists wherever there is a joint liability and one that exists as to the levy of general taxes. Whenever there is a failure to collect all general taxes there is a loss that must be borne by those who pay, but that does not release them from the burden of meeting the obligations jointly due. *State ex rel. Soutter v. Madison,* 15 Wis. 30."

POINT 2

Under legislation existing in 1928, the acquisition by the State of Michigan of the absolute title to lands under the tax laws and the subsequent conveyance by the State to a purchaser, would not have destroyed plaintiff's right to an additional assessment to pay its bonds.

Under the village charter, delinquent special assessments along with delinquent village taxes, were returned to the county treasurer for collection under the general tax laws (R. 5). Thereafter the general tax laws relative to the collection of such special assessments and the sale and redemption of property for the non-payment thereof, were applicable. (1 Comp. Laws, 1929, Sections 3500-3501) *Auditor General v. Maier*, 95 Mich. 127.

In 1928 when the bonds in question were issued, Section 127 of Act No. 206, Pub. Acts, 1893, as amended (1 Comp. Laws, 1929, Section 3520), provided that "whenever it shall appear by the records in the auditor general's office that any lands are delinquent for taxes for five (5) years or more and that said lands have been bid off to the state one (1) or more times by reasons of such delinquent taxes, and that the time of redemption of such sale or sales has expired and that no application has been made to pay, to redeem or purchase the same, and it shall appear that no action is pending in the circuit court of the county where said lands are situated to set aside the taxes or remove the cloud on the title occasioned thereby, the title to the state shall be deemed absolute in and to said lands." Said section then provides that such lands shall, upon certain designated conditions, be transferred by deed to the State of Michigan as to an individual and that "upon the execution and delivery of said deed or deeds to the director of conservation, said director shall hold said

lands as state lands subject to the provisions hereinafter contained."

The title held by the state upon such conveyance is defined in *Alcona County Supervisors v. Auditor General*, 136 Mich. 130, on page 133 as follows:

> "We thinks all of these provisions, taken together, when read in connection with the other provisions of the state tax law, to which references need not be given, indicate that the whole theory of the taxing laws is to vest the title in the state, as between itself and the original owner, but for the state, county, and township, in proportion to the several taxes due to each."

(Under the tax laws the above mentioned trust would apply to village and city taxes where returned to the county treasurer.)

Section 130 of said Act (1 Comp. Laws, 1929, Section 3524) specifies the effect of such a deed upon outstanding taxes. This was the only statutory provision existing prior to 1937 which defined the effect of such a deed to the State of Michigan. So far as pertinent to this case, said section reads as follows:

> "*All taxes charged against such lands in the office of the auditor general at the time they are deeded to the state shall be cancelled,* • • •. The supervisor shall omit and cancel from his assessment roll all said lands so deeded to the state, • • • and said lands so deeded as aforesaid shall not be liable to any assessment for any purpose until the same are again sold and deeded by the state, and notice of said sale and deeding given to the county treasurer by the commissioner of the state land office, as hereinafter provided." (Italics ours.)

The word "taxes" as used in the above section has never been construed by the Michigan Supreme Court as

including special assessments. In *Case v. City of Saginaw*, 196 Mich. 687, the Supreme Court of Michigan divided evenly upon the question of whether said section applied to special assessments. The particular issue then before the court was whether or not the yearly installments of a special assessment which were a lien upon the property at the time it was deeded to the state under the general tax law, but which had become due subsequent to the time the state conveyed the property to the plaintiff, had been cancelled. The Circuit Court held that no such cancellation had taken place, which decision was affirmed by an equally divided court. Three of the justices held that the above section did not apply to a special assessment. A fourth justice held that installments which were a lien upon the property at the time the state acquired title but which did not become due until after the state had parted with the title, were not cancelled. The remaining four justices held that future due installments were cancelled. The decision of the latter justices was predicated upon the fact that a lien for the special tax existed at the time the state acquired title to the lands in the tax proceedings.

The *Saginaw* case, however, is not parallel to the present case because of the fact that the special assessments in that case, even though due in future years, were a lien upon the property at the time it was deeded to the state and were actually in existence, whereas, the yet unlevied special assessment sought in the present case, was of course not in existence either when the state acquired title in November, 1939 or when the state sold the property in 1940.

That an additional assessment to cover a deficiency is not a lien upon the land prior to the levy thereof, was established by this court in *Mullen Benevolent Corporation v. United States*, 290 U. S. 89. In that case the United States Government purchased lands against which

there were outstanding special assessments which assessments were paid by the Government at the time of purchase. Subsequently an additional assessment was levied because of a deficiency in the collection of the original assessments, which additional assessment covered properties previously purchased by the Government. This court on page 95 said:

> "What has been said shows that the respondent did not take or destroy any lien belonging to the petitioner. None remained upon the land, when the purchases were consummated. The reassessments were the result of proceedings begun thereafter. They were ineffective to create a lien upon lands owned by the government. *United States v. Buffalo*, 54 (F.) (2d) 471."

There is no decision by the Michigan Supreme Court upon the question of the effect upon non-existing additional assessments, of a tax deed to the State of Michigan under laws existing prior to 1937.

Assuming for the sake of argument that the word "taxes" as used in said Section 130 is to be construed as including special assessments, then let us examine the provisions of that section to determine exactly what special assessments are to be cancelled thereunder. The first sentence of the section so far as pertinent to this discussion is as follows:

> "All taxes charged against lands in the office of the auditor general at the time they are deeded to the state shall be cancelled, * * *."

No attempt is made under that section to cancel any taxes which are not charged against the lands in the office of the auditor general. Under the state tax laws, taxes are returned to the county treasurer on March 1st following the time when they become delinquent. The county

treasurer prior to 1937 was required to file a transcript of such returned taxes in the office of the auditor general on or before the first day of May next after such return (1 Comp. Laws, 1929, Section 3448). Therefore, no tax or special assessment could be charged against lands in the office of the auditor general until first such tax or special assessment had been levied and had been returned as delinquent to the country treasurer.

In the present case the additional assessment has not yet been made and therefore was not charged against the lands in the office of the auditor general at the time such lands were deeded to the state in November, 1939. Therefore under the laws existing at the time of the issuance of plaintiff's bonds and up to the passage of the 1937 legislation, plaintiff's right to an additional assessment would not have been cancelled inasmuch as said Section 130 (the only statutory provision relative to cancellation) did not cancel any taxes which were not charged in the office of the auditor general.

Under said Section 130 exemption from "assessment for any purpose" extended only to the time the lands were again sold and deeded by the state. There is no prohibition against an additional assessment after the title has been transferred to a private owner.

This case was decided by the Michigan Supreme Court upon the basis that the 1937 and 1939 legislation (and not any prior legislation) cancelled plaintiff's right to an additional assessment.

POINT 3

The 1937 and 1939 legislation, as interpreted by the Michigan Supreme Court, cancelled Plaintiff's contractual right to an additional assessment to pay its bonds.

The basis of the defense in the State Supreme Court and also of the decision of that court, was the language added to the form of decree to be entered for the sale of the property for tax delinquencies, by Act No. 114, Pub. Acts, 1937 and Act No. 282, Pub. Acts, 1939 (Comp. Laws Supp. 1940, Section 3459) and Sections 9 and 10 of Act No. 155, Pub. Acts, 1937, as amended by Act No. 244, Pub. Acts, 1939 (Comp. Laws Supp. 1940, Sections 3723-9 and 3723-10). *Municipal Investors Association v. Birmingham*, 298 Mich. 323-5.

Prior to 1937, Section 67 of Act No. 206, Pub. Acts 1893 (1 Comp. Laws, 1929, Section 3459) provided for a decree by the chancery court which simply ordered the sale of properties set forth in the auditor general's petition but did not prescribe the effect of such a sale. The said 1937 and 1939 amendments to Section 67 added to the form of decree to be entered by the circuit court, the following provision:

> "It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and incumbrances, of whatever kind or nature, cancelled as of such date, * * *."

Said Act No. 155, Pub. Acts of 1937, was a new act which created the State Land Office Board and provided for the auction sale of properties, the title to which had become

vested in the state under the tax laws, at not less than 25% of their assessed valuation for the year preceding the vesting of title in the state. Section 9 thereof contains the following provision:

> "Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any incumbrances, except as herein otherwise provided."

Section 10 of said act, as amended by Act No. 244, Pub. Acts, 1939, provides for the distribution of the receipts of moneys by the State Land Office Board among the several tax assessing units "in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act" and then concludes with the following sentence:

> "Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the State of Michigan."

In the Michigan Supreme Court the Defendants contended that by virtue of the above statutory provisions enacted in 1937 and 1939, Plaintiff's right to an additional special assessment was cancelled. Plaintiff argued that the additional assessment was not yet a lien under *Mullen Benevolent Corporation v. United States,* 290 U. S. 89, and therefore was not cancelled. In denying our contention, the Michigan Court in the opinions written by both Justices Chandler and Sharpe, stresses the fact that the above 1937 and 1939 legislation provided that the deed to the State of Michigan and the deed from the State of Michigan to the purchaser, conveyed title "free from any incumbrances." In the opinion written by Mr. Justice

Sharpe it is admitted that "it is the general rule that a special assessment does not become an incumbrance until it has become a lien against the premises" but after defining incumbrance, the conclusion is reached that "under the above definition of an incumbrances it would naturally follow that *the possibility of a reassessment would constitute an incumbrance* and thus be cancelled." (Italics ours.)

Prior to 1937, the only cancellation provided for under the tax laws was the cancellation of taxes charged against the property in the office of the auditor general at the time it was deeded to the state (1 Comp. Laws, 1929, Section 3524). Certainly under such prior laws the "possibility of a reassessment" was not an assessment charged in the office of the auditor general. The 1937 and 1939 legislation (as interpreted by the Michigan Court in this case) went beyond the former laws when it cancelled even the "possibility" of an additional assessment. It was, therefore, this 1937 and 1939 legislation which cancelled Plaintiff's right to an additional assessment, according to the Michigan Supreme Court.

POINT 4

The 1937 and 1939 legislation is in violation of that part of Section 10 of Article I of the Constitution of the United States which provides that no state shall pass any law impairing the obligation of contracts.

Bonds payable solely from the collection of special assessments have been issued all over the United States for the purpose of providing funds with which to make public improvements. In some cases these bonds pledge the full faith and credit of the issuing municipality but in the present case, as well as in many other cases in Michigan and in other states, no such pledge has been made. It is evident therefore that if bonds payable solely from the collection of special assessments do not carry with them any right to an additional assessment in case of a deficiency in the fund from which they are payable, such bonds would seldom be paid in full. Certainly no person would purchase such a bond without an accompanying right to an additional assessment. This court recognized the necessity of such right in *Kadow v. Paul, supra,* and expressed itself very strongly in that respect.

In the present case the Village of Birmingham not only pledged the original special assessments to the payment of the bonds but also by charter provided for an additional assessment to supply a possible deficiency. It is agreed by all the parties in the present case that the original assessments already collected and any possible future collections thereof will not be sufficient to pay the outstanding bonds. Therefore, the only remaining remedy of the bondholders lies in an additional assessment; but that remedy will be destroyed under the 1937 and 1939 legislation unless this court reverses the decision of the state court.

Following periodical cancellations of interest and penalties on delinquent taxes, extensions of time within which to pay such taxes, and a suspension of annual tax sales during the years 1933 to 1937, both inclusive, the Michigan Legislature in 1937 provided for the resumption of annual tax sales beginning in 1938 (Comp. Laws Supp. 1940, Section 3451). As a result of various changes in statutory provisions which were designed to discourage the purchase of lands at tax sales by private buyers, (*) there were as anticipated few such buyers at the 1938 sale. An exceedingly large number of properties were bid in to the State of Michigan at that sale for the lack of any other bid. Under the Michigan law it is necessary for a private buyer at a tax sale to bid and pay the full amount of the taxes for which the property is being sold. (1 Comp. Laws, 1929, Sec. 3462; Comp. Laws Supp. 1940, Sec. 3462) From the standpoint of the collection of taxes, it is therefore desirable that property be sold to a private bidder rather than to be bid in to the State of Michigan. As will be seen from the following discussion, the laws in force at the time of the 1938 sale first discouraged the property owner from paying his taxes before it went to tax sale and then discouraged any bid at that sale.

At the same session in 1937, the legislature also enacted Act No. 155, Pub. Acts, 1937 (Scavenger Sale Act) by which it created the State Land Office Board and authorized that board to sell at public auction lands (located in the southern half of the lower peninsula), the title to

---

*In addition to those changes hereinafter referred to, the amount necessary to be paid by an owner to a tax title purchaser for a reconveyance after the expiration of the period of redemption, was reduced in 1932 from 100% additional (1 Comp. Laws, 1929, Section 3536) to 50% additional (Act 10, Pub. Acts, 1932, First Extra Session) and again in 1937 to 10% additional (Act 283, Pub. Acts, 1937).

which had become absolute in the State of Michigan by reason of the fact that such lands had been bid in to the State of Michigan at a tax sale and had not been redeemed within the period provided therefor. The effect of this act was that the lands bid in to the State of Michigan at the tax sale in 1938 and which were not redeemed during the following eighteen months' redemption period (which includes the lands involved in this litigation) were sold by the State Land Office Board beginning in February, 1940.

The so-called Scavenger Sale Act gave former owners particular advantages over strangers to the title. Strangers were required to pay for the property within twenty-four hours of the sale whereas former owners could purchase on land contract with payments extended over not to exceed ten years. If a stranger to the title was the successful bidder, then under the statute the former owner could purchase the property by matching the bid within thirty days and in such case could also purchase upon a land contract if he so desired. This provision would naturally result in a former owner refusing to over-bid a stranger to the title at the auction sale, thereby permitting the former owner to purchase the property within thirty days thereafter at the lowest possible price, in fact, a price lower than that which he perhaps would have been willing to pay for the property had he been required to compete with a stranger to the title at the auction sale. Under such a provision of the statute, the bid price might be considerably less than the true market value. Also, the effect of throwing so many properties on the market at the same time tended to force down the sale price.

The provision of the statute permitting a former owner to match the bid of a stranger to the title, also naturally

deterred strangers from bidding at the sale. After a stranger to the title had spent considerable time and perhaps money in investigating properties upon which he intended to bid, had attended the sale, secured the award of the properties and deposited his money within twenty-four hours, even then he had no assurance that he could obtain a deed. If a former owner matched his bid, then his only redress was the return of the amount he paid in, without interest; he received no remuneration of any kind for the time and money he might have spent in investigating the properties and for the use during the thirty days of the money which he had deposited and, in the meantime, his money had been tied up and was not available for the purchase of other properties.

We have recited the foregoing for the purpose of calling attention to the fact that what the statute called an auction sale was, in fact nothing of the kind because the incentive for competition was removed. To many owners, the Scavenger Sale was the bargain counter upon which they could profit by settling their tax obligations at a material discount.

The above mentioned 1937 legislation was adopted a year before the 1938 tax sale and about two and one-half years before the 1940 Scavenger Sale. Such legislation laid out a very definite program whereby the property owner delinquent in the payment of his taxes, could settle such taxes at a discount. In effect, it constituted an invitation to him to let his taxes go unpaid, to permit his property to be sold at the 1938 tax sale, and to fail to redeem the same within the eighteen months' redemption period, whereupon he could then repurchase his property at far less than the accumulated taxes. With such an invitation to the delinquent taxpayer, it is no wonder that a large amount of property went through the Scavenger Sale.

The Michigan Legislature, however, was not satisfied to stop here. It went a step further and cancelled not only the existing taxes including future due installments of existing special assessments, but also, in accordance with the interpretation placed upon the statutes by the Michigan Supreme Court, removed any liability for a yet unlevied additional or supplemental special assessment which might be necessary to repay the money which was borrowed for the purpose of improving the property.

It is this latter phase of the 1937 and 1939 legislation with which we are concerned in this case, that is, the cancellation of plaintiff's right to such an additional assessment. This case therefore involves the constitutionality of statutes which destroy the last remaining remedy of the bondholder—a remedy which was established by contract and which is necessary if the bond contract is to be performed.

The decisions of this court have well established the principle that the means established for the enforcement of a contract, by laws existing at the time the contract was entered into, forms a part of such contract and under the provisions of the federal constitution cannot be impaired. The following cases sustain the above principle as applied to contract rights of municipal bondholders:

Von Hoffman v. City of Quincy, 4 Wall. 535;
State of Louisiana v. City of New Orleans, 102 U. S. 203;
Wolff v. City of New Orleans, 103 U. S. 358;
Ralls County Court v. United States, 105 U. S. 733;
Mobile v. Watson, 116 U. S. 289;
Louisiana v. Pillsbury, 105 U. S. 278;
Seibert v. Lewis, 122 U. S. 284;

Louisiana ex rel. Hubert, Receiver, v. City of New Orleans, 215 U. S. 170;
Hendrickson v. Apperson, 245 U. S. 105;
W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56 (55 Sup. Ct. 555, 97 A. L. R. 905).

In some of the foregoing cases the impairment went to the extent of only making the remedy less efficacious and yet the statutes were held to be unconstitutional. The present case, however, is much stronger against constitutionality because of the fact that the acts in question absolutely destroy any further remedy.

As illustrative of the above decisions, we quote from *Louisiana ex rel. Hubert, Receiver, v. City of New Orleans,* 215 U. S. 170, 178, where this court said:

> "The power of taxation conferred by law entered into the obligation of the contracts, and any subsequent legislation withdrawing or lessening such power, leaving the creditors without adequate means of satisfaction, impaired the obligation of their contracts within the meaning of the Constitution. *Memphis v. U. S.,* 97 U. S. 293; *Von Hoffman v. City of Quincy,* 4 Wall. 535; *Seibert v. Lewis,* 122 U. S. 284; *Mobile v. Watson,* 116 U. S. 289; *Scotland County Court v. Hill,* 140 U. S. 41."

In *Wolff v. City of New Orleans,* 103 U. S. 358, the argument was made that the taxing power belongs exclusively to the legislative department of the government and when delegated to a municipal corporation may, equally with other powers of the corporation, be rejected or restricted at the pleasure of the legislature. In answer to that argument, the court on page 365 of the opinion said:

> "It is true that the power of taxation belongs exclusively to the legislative department, and that the Legislature may at any time restrict or revoke

at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement."

The principles established in the above cases were reaffirmed in the recent case of *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56 (55 Sup. Ct. 555; 97 A. L. R. 905), where this court held invalid an Arkansas statute on the ground that it impaired the obligation of the bondholders' contract. The plaintiff in that case was the holder of certain bonds secured by a mortgage upon benefit assessments against property within the improvement district. An act adopted in 1933, after the issuance of the bonds, provided for certain delays in the enforcements of the assessments and reduced the penalties. These are set forth on pages 58 and 59. The Court in its opinion delivered by Mr. Justice Cardozo, beginning on page 60, said:

"To know the obligation of a contract we look at the laws in force at its making. *Sturges v. Crowinshield*, 4 Wheat. 122, 197, 4 L. Ed. 529, 549; *Home Bldg. & L. Asso. v. Blaisdell*, 290 U. S. 398, 429, 78 L. Ed. 413, 423, 54 S. Ct. 231, 88 A. L. R. 1481. In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. Ed. 93, 16 S. Ct. 1042; *cf. Home Bldg. & L. Asso. v. Blaisdell, supra* (290 U. S. 429, 434, 78 L. Ed. 423, 426, 54 S. Ct. 231, 88 A. L. R. 1481), where the cases are assembled.

The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. *W. B. Worthen Co. v. Thomas,* 292 U. S. 426, 433, 78 L. Ed. 1344, 1346, 54 S. Ct. 816, 93 A. L. R. 173, distinguishing *Home Bldg. & L. Asso. v. Blaisdell,* 290 U. S. 398, 78 L. Ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481, *supra.* • • •

"Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay. Under the present statutes he has every incentive to refuse to pay a dollar, either for interest or for principal. • • •

"Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the other, there is no occasion to consider. A state is free to regulate the procedure in its courts even with reference to contracts already made (*Bronson v. Kinzie,* 1 How. 311, 11 L. Ed. 143), and moderate extensions of the time for pleading or for trials will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up so as to make the remedy a shadow. • • • What controls our judgment at such times is the underlying reality rather than the form or label. The changes or remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attracticeness and value to collateral security."

It is significant that the opinion in the above case was written in 1935 during the depression and when there existed all of the economic circumstances recited on pages 320-21 of the reported opinion of the Michigan Supreme Court in the present case. The Arkansas act in the *Worthen* case did not attempt to absolutely destroy the bondholders' remedy. In fact there was no one change which alone might have rendered the act invalid. It was rather an accumulation of many changes in the law which made the remedy a "shadow." If the Arkansas act was unconstitutional, then the Michigan acts which go further and destroy the remedy absolutely, must be unconstitutional. For this court to sustain the Michigan acts would necessitate the over-ruling of the decision in the *Worthen* case.

In the first part of the discussion under this heading we called attention to the fact that the statutes herein involved took from the property owner the incentive to pay his taxes. Applicable, indeed, to the situation in the present case was the following statement made by Mr Justice Cardozo in the *Worthen* case:

> "Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay. Under the present statutes he has every incentive to refuse to pay a dollar, either for interest or for principal. * * *" (Page 60).

We know of no case where this court has hesitated to declare invalid state statutes which destroyed substantial remedies. Some state statutes have been sustained where the remedy was not materially affected but none where the remedy was destroyed as in the present case.

Recently there has been considerable discussion in cases before this court as to the effect of the reserved police power. Those cases, however, represent no change

in the fundamental principles in respect to the contract clause of the constitution. That the contract clause of the constitution and the reserved police power must be construed in harmony with each other, is not a new doctrine. See cases cited in *Home Bldg. & L. Asso. v. Blaisdell*, 290 U. S. 398, 435-438. In that case, after reviewing the various pronouncements of this court, Mr. Chief Justice Hughes on page 439 said:

> "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principal precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community."

Notwithstanding the fact that in some of the recent cases, this court may have stressed the reserved police power, yet in no case has it permitted a state statute to absolutely destroy all remedies available to the creditor.

In the *Blaisdell* case, no attempt was made by the Minnesota statute to destroy the remedy of the mortgagee. The mortgagee's remedy was modified only to the extent that the period of redemption was extended to such additional time as the court might deem just and equitable but in no event beyond May 1, 1935, conditioned, however,

that the mortgagor during the extended period should pay the rental value of the premises as ascertained in judicial proceedings, such amount to apply upon the principal and interest of the mortgage indebtedness. That the court had no intention of countenancing statutory modification of contracts in vital particulars, is evidenced by the following language on pages 445-6 of the opinion:

> "The conditions upon which the period of redemption is extended do not appear to be unreasonable. The initial extension of the time of redemption for thirty days from the approval of the Act was obviously to give a reasonable opportunity for the authorized application to the court. As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. * * * The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief."

As bearing upon the interpretation to be placed upon the opinion in the *Blaisdell* case in its application to the remedies of municipal bondholders, we think it significant that subsequent thereto this court by unanimous decision in *W. B. Worthen Company v. Kavanaugh, supra,* declared unconstitutional a state statute far less objectionable than those involved in the present litigation.

A class of cases in which this court has sustained state statutes under the doctrine of the reserved police power, are those involving statutes regulating deficiency judg-

ments in mortgage foreclosure cases, the most recent being *Gelfert v. National City Bank,* 313 U. S. 221. Those decisions have been confined to cases where the mortgagee became the purchaser at the foreclosure sale. (This court in the *Gelfert* case stated that it intimated no opinion on the question of constitutionality as applied to a case where the mortgagee is not the purchaser.) The opinion in the Gelfert case concludes on page 234 as follows:

> "In conclusion, the statute in question, like the one involved in *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., supra,* p. 130, 'cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full.' Here, as in that case, the obligation of the mortgagee's contract is recognized; the statute does no more than limit 'that right so as to prevent his obtaining more than his due.'"

The foregoing quotation distinguishes that case from the one now before this court.

In *Wood et al. v. Lovett,* 313 U. S. 362, certain lands were sold in 1933 for the non-payment of the 1932 taxes. The owner failed to redeem and the land was certified to the State of Arkansas as owner. In 1936 it was conveyed by the State to Wood et al. Act 142 of 1935 provided that tax deeds should not be set aside for certain irregularities. In 1937 this act was repealed. In 1939 the corporation which owned the property at the time of the tax sale, deeded the same to Lovett who in that action sought to quiet his title, claiming certain irregularities in the tax sale. Wood et al. defended their title solely upon the basis of the 1935 act, claiming that the 1937 repealing act impaired the obligation of their contract. The majority of this court held that the 1937 repealing act was unconstitutional for the reason claimed. Three of the justices dissented upon the ground that the Arkansas

statute "comes well within the permissive area of state legislation as that area is defined by the Blaisdell case and the decisions upon which that case rests." In the dissenting opinion written by Mr. Justice Black, attention is called to the fact that "at the time of the forfeiture and the sale to the state, Arkansas law protected the purchaser by providing that he should be reimbursed and made whole in case his tax purchase was set aside for irregularity;" that "the repealing act of which appellants complain did not take away any part of that right"; that "the whole course of legislation in Arkansas shows a desire to be fair both to the purchaser of tax forfeited land and to the former owners whose land is about to be lost by reason of drastic device of forfeiture." In the present case there was no such attempt on the part of the Michigan legislature to be fair to the bondholder and to assure him of the return of his money. On the contrary the Michigan legislation prevented the return of the bondholder's money. The reasoning of the dissenting justices is therefore not applicable here.

In concluding our discussion of the decisions of this court upon the contract clause of the Constitution, we believe we can say without fear of contradiction that every opinion of this court (whether majority or minority) has adhered to the principle laid down by Mr. Chief Justice Hughes on page 439 of the opinion in the *Blaisdell* case, who after declaring that the contract clause and the reserved police power must be construed in harmony with each other, said:

> "This priciple precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

In the following cases subordinate federal courts and state courts have held state statutes to be unconstitutional in that they violated the bondholders' contract rights. In some of the cases the violation was very similar to that complained of here.

Nelson v. Pitts, 126 Okla. 191 (53 A. L. R. 1137);

Borough of Fort Lee, N. J., v. United States, C. C. A. (3rd Circuit) (1939), 104 Fed. (2d) 275;

Brown-Crummer Inv. Co. v. Paulter, C. C. A., (10th Circuit) (1934), 70 Fed. Rep. (2d) 184:

Moore v. Branch, (Dist. Ct. S. D. Florida, Ocala Division) (1934), 5 Fed. Supp. 1011, (Before Bryan, Circuit Judge, Ritter and Strum, District Judges);

People ex rel. Equitable Life Assur. Soc. of United States v. Pierce, (Sup. Ct. App. Div.), 176 N. Y. Supp. 412;

Islais Co., Limited, v. Matheson, (California) (1935), 45 Pac. (2d) 326;

Straughn v. Berry (Oklahoma) (1937), 65 Pac. (2) 1203;

Read v. Beczkiewicz, (Indiana) (1939), 18 N. E. (2d) 739;

State ex rel. Sherril v. Milam (Florida) (1933), 153 So. Rep. 100;

Dallas County Levee Improvement Dist. No. 6 v. Rugel (Comm. of Appeals of Texas) (1931), 36 S. W. (2d) 188;

State v. Port of Palm Beach District (Florida) (1935), 164 So. 851;

In re Special Assessments for Paving District No. 3, in City of Golden (Colorado) (1939), 95 Pac. (2d) 806;

In re Cranberry Creek Drainage District (Wisconsin) (1930), 231 N. W. 588;
Atwood, et al. v. Kelley, et al. (Court of Civil Appeals of Texas) (1939), 127 S. W. (2d) 555.

It will be noted that in many of the above cases, *W. B. Worthen Company v. Kavanaugh, supra,* is cited.

For declarations of the Michigan supreme court in respect to contract rights of municipal bondholders, see *Board of Education of the City of Lincoln Park v. Board of Education of the City of Detroit,* 245 Mich. 411, 414; *Thompson v. Auditor General,* 261 Mich. 624, 657.

The decision by the Michigan court in the present case is based largely upon the fact that the court declared the acts in question to be constitutional in the case of *Baker v. State Land Office Board,* 294 Mich. 587. We desire to emphasize that in the *Baker* case there was under discussion only those "tax liens and assessments already assessed and levied" (page 599). The question here was not considered in that case. On page 323 of the reported opinion in this case, the court quotes from its opinion in the *Baker* case as follows:

> "In addition to our determination as above expressed, it can be said that such purchasers can be assumed to have purchased with knowledge that the lien upon the property securing such taxes and assessments might be displaced."

If the court intended that the above quoted statement should be applicable to the present situation (notwithstanding that an unlevied assessment creates no lien* and that the additional assessment was destroyed and not displaced), then we know of no decision to substantiate

*Mullen Benevolent Corporation v. United States, 290 U. S. 89.

that statement. It is absolutely contrary to the repeated pronouncements of this court. On the contrary, every purchaser of bonds takes the same with the knowledge that the Constitution of the United States absolutely prohibits the destruction of his substantial contract rights.

An additional assessment to supply a deficiency in the funds of the district is the means by which the district fulfills its obligation to pay its bonds. In the case of the general obligation bonds of a municipality, if a delinquency results in the collection of taxes for any interest or principal payment, then the municipality is obligated to levy the amount of the deficiency upon the next tax roll. Such a levy is comparable to an additional special assessment. If the legislature can cancel the right to an additional special assessment to pay a special assessment bond, then why can it not cancel the right to such a second tax levy to pay a general obligation bond? If that can be done, then the pledging of the full faith and credit of the various cities and other political subdivisions of the United States will be a nullity. It was to prevent just such a situation that the contract clause was originally place in our Constitution. *Home Building and Loan Assn. v. Blaisdell,* 290 U. S. 398, 427.

The decision of the Michigan court is especially detrimental to the contract rights of persons holding bonds last maturing in any issue. The fact is well illustrated by the present case. When the bonds of this issue were originally sold, no preference was intended as to any bond, yet as a result of the Michigan decision, we have a situation where the first bond maturities have been paid in full and the bonds of the later maturities left without any means of payment whatsoever, not because the city did not make adequate provision for the payment of the last as well as the first maturities, but because the legislature subsequently destroyed the means of payment.

Even though the 1937 and 1939 legislation should be declared unconstitutional to the extent that we herein contend, that would not deprive the property owners of those benefits accruing from the cancellation of general taxes and *existing* special assessments. It would simply mean that in those cases where an additional assessment should be necessary to pay bonds, that such an assessment could be levied against all the property in the district, including both those lands upon which the assessments had been paid and those lands upon which the assessments had been cancelled either in whole or in part. Such would be the equitable procedure.

Special assessments are levied upon the basis that the improvements benefit the property assessed and that the benefited property should pay the cost thereof. Under the 1937 and 1939 legislation, however, the property owner can retain the benefits and at the same time relieve himself of any liability therefor. He can sell his property at an enhanced price resulting from the improvement and thereby enrich himself at the expense of the bondholder.

We do not take the position here that the acts in question should be declared invalid in their entirety but only as they prevent additional assessments necessary to pay outstanding bonds where the right to such additional assessments existed at the time of the issuance of the bonds. In *Baker v. State Land Office Board, supra,* we filed a brief *amici curaie* upon the question of the constitutionality of the Scavenger Sale Act as it applied to *outstanding* special assessments. In that brief we did not attack the title of the act as might be inferred from the reported opinion in the present case (page 323). That was done by other counsel. We concluded our brief in the *Baker* case with this statement:

> "We do not take the position that the act should be declared unconstitutional in its entirety. In its

application generally, it does not affect contract rights. We insist, however, that contract rights should be protected by this court in any opinion rendered in this case, and that where there are outstanding bonds payable from special assessments only, that the constitutionality should be limited to those cases where there exists a valid and adequate right to reassess against all the lands in the special assessment district, the amount of any deficiency resulting from the cancellation of special assessments under the act."

In this case we have what we referred to in our brief in the *Baker* case, *i. e.*, the right to an additional pro rata assessment to supply the deficiency resulting from the non-payment of special assessments by a large percentage of the property owners, which right we contend still exists, and that the statutes in question in so far as they attempt to destroy that right, are repugnant to the contract clause of Section 10 of Article I of the Constitution of the United States.

POINT 5

The 1937 and 1939 legislation is in violation of the 5th and 14th amendments to the Constitution of the United States which prohibit the taking of property without due process of law.

While primarily the statutes herein involved violate the contract clause of the Constitution, yet they also are repugnant to the due process clauses of the 5th and 14th amendments. The contract right to an additional assessment is property. The statutes in question deprive plaintiff of such property and therefore are in violation of the due process clauses of the above mentioned amendments. *Lynch v. United States,* 292 U. S. 571; *Treigle v. Acme Homestead Association,* 297 U. S. 189. In the *Lynch* case this court on page 579 said:

> "Second. The 5th amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the 5th amendment."

CONCLUSION

In conclusion, we submit that for the reasons hereinbefore set forth, the judgment of the Supreme Court of the State of Michigan should be reversed and that said cause should be remanded to the Supreme Court of the State of Michigan for such additional action by said court as may be necessary in order that appellant may have the relief prayed for in its petition for a writ of mandamus

CLAUDE H. STEVENS,
Attorney for Plaintiff and Appellant,
1000 Penobscot Building,
Detroit, Michigan.

BERRY & STEVENS,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Appellant,
vs.
CITY OF BIRMINGHAM, a Municipal Corporation, et al.,
Appellees

REPLY BRIEF OF APPELLANT

CLAUDE H. STEVENS,
Attorney for Appellant,
1000 Penobscot Building,
Detroit, Michigan.

BERRY & STEVENS,
Of Counsel.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

INDEX TO SUBJECT MATTER

	Page
I. Grounds of Jurisdiction	1-3
II. Argument	4-16
1. Reply to Appellees' Argument under their Point III	4-5
2. Reply to Appellees' Argument under their Point IV in re Charter Provisions for Additional Assessments	6-9
3. Reply to Appellees' Argument under their Point II in re Statutory Provisions	9-13
4. Reply to Appellees' Argument under their Point I in re Reserved Sovereign Power	13-16
III. Conclusion	17-18

TABLE OF CASES CITED

Baker v. State Land Office Board, 294 Mich. 587 ..... 11, 15

Case v. City of Saginaw, 196 Mich. 687 12

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398 ..... 13, 14, 17

In re Dancy Drainage District, 190 Wis. 327, 208 N. W. 479 9

Irving Trust Co. v. Day, 62 Sup. Ct. Rep. 398 2

Kadow v. Paul, 274 U. S. 175 9

State ex rel. Frazer v. Holt County Court, 135 Mo. 533, 375 S. W. 521 9

State v. Vancouver, 160 Wash. 655 6

Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U. S. 32 ..... 13, 14, 15

Wilson v. City of Pontiac, 294 Mich. 79 5

W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56 ..... 16, 17

INDEX TO CITATIONS TO STATUTES AND CHARTER

Michigan Compiled Laws 1929

	Page
Section 1786	16
Section 2691	8
Section 3520	11, 12
Section 3524	10, 12

Michigan Public Acts

Act 273, Public Acts 1925	8

Charter

Sec. 15, Chapter XXI, Village Charter	7
Sec. 22, Chapter XX, Village Charter	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Appellant,
vs.
CITY OF BIRMINGHAM, a Municipal Corporation, et al.,
Appellees

REPLY BRIEF OF APPELLANT

I.

GROUNDS OF JURISDICTION

Appellees admit the jurisdiction of this court. However on pages 2 and 3 of their brief they state that "The court below did not pass upon the possible defense that Appellant would not have had the right to reassess even if no consideration were given to the 1937 and 1939 legislation under attack on this appeal"; that such is a non-federal

question; and that if this court reverses the state court on the question of constitutionality of the 1937 and 1939 legislation, then this court "should remand the case to the Supreme Court of Michigan to decide the non-federal question as to whether any right of reassessment exists apart from the unconstitutional provisions of the 1937 and 1939 statutes."

We can not agree with the above contentions. In the court below Appellant attacked the 1937 and 1939 legislation on the ground that it impaired the obligation of Appellant's bond contract. That attack necessarily involved the very question of whether or not the 1937 and 1939 legislation changed the pre-existing statutes. The 1937 and 1939 legislation considered alone, is not unconstitutional. It is unconstitutional only in relation to the pre-existing statutes which form a part of Appellant's bond contract. Unless a change was made, then there has been no impairment. Before the Michigan court could reach the constitutional question, it had to determine that the Appellant did not have the same right under the 1937 and 1939 legislation which it had under pre-existing statutes.

Granting, for the sake of the argument, that the state court did not pass upon the question of Appellant's right to a reassessment under laws existing prior to the 1937 and 1939 legislation, we can not agree that such is a non-federal question. Appellant's contract is comprised not only of the particular proceedings for the issuance of the bonds in question and the bonds themselves, but also of the then existing provisions of the charter of the Village of Birmingham and the state statutes. This court in *Irving Trust Company v. Day*, 62 Sup. Ct. Rep. 398, 401, said:

> "When this court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and

> the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the federal constitution, and for such purposes finality can not be accorded to the views of a state court."

Therefore, in this case the interpretation of the tax laws existing in 1928 (which were not changed prior to 1937 so far as the issues in this case are concerned) is a matter of determination by this court rather than by the state court.

II.

ARGUMENT

We shall discuss Appellees' Points in the following order, viz: III, IV, II and I.

1.

Reply to Appellees' Argument Under Their Point III

The State of Michigan takes the position that this case should not be decided upon its merits because its agency, the State Land Office Board, has agreed with one (not all) of the former owners of property in this special assessment district successfully bidding at the Scavenger Sale, to postpone the execution of the purchase contract. In other words, the State of Michigan is seeking to ward off a decision on the meritorious questions in this case by raising its own voluntary act as a defense. The Appellees, the City of Birmingham and its several officials, do not join in this contention. The determination of the constitutional questions herein involved are exceedingly important, not only in respect to this and various other situations in the City of Birmingham, but also in respect to numerous other situations throughout the state. As long as these constitutional questions remain undetermined, the title conveyed by the state as a result of the Scavenger Sale, will be questionable. No claim is made by the State of Michigan that it has cancelled the sale to this particular purchaser. In fact, according to its own statements it has extended the time for execution of the contract until after the decision of this case (R. 16). The purchaser still retains the right to purchase the property, which it can enforce at any time.

It should be noted that all of the property in this special assessment district, sold at the Scavenger Sale, was not sold to the particular purchaser to whom such extension was given (R. 15) and therefore the argument of the Attorney General is not applicable as to all properties against which an additional assessment is sought.

However, the answer to the entire argument of the Attorney General is found in *Wilson v. City of Pontiac*, 294 Mich. 79, where the Michigan court held that properties sold by the State Land Office Board at the Scavenger Sale become taxable immediately upon such sale notwithstanding any delay in the execution of a deed or land contract. The Michigan court in the present case approved and followed the rule established in the *Wilson* case and in its opinion (R. 21) said:

> "Pursuant to legislative intent the Michigan Supreme Court has held that a taxpayer may bring mandamus to compel a city to place on its tax rolls immediately all parcels of land sold under the 'scavenger' act even though the State land office board had not as yet executed deeds or contracts to the successful bidder; that such lands are subject to taxation when a bid is accepted and notice of sale given by the agent of the board to the county treasurer who in turn is obliged to notify the proper assessing officers. *Wilson v. City of Pontiac*, 294 Mich. 79."

2.

Reply to Appellees' Argument Under Their Point IV in re Charter Provisions for Additional Assessment

We discussed the charter authority for additional assessments under Point I of our first brief on pages 15 to 20, inclusive.

Inasmuch as the issues on this appeal are limited to those based upon Appellant's contract rights, the only charter provisions relevant to this discussion are those found in the village charter which formed a part of the bond contract. The allegations in the petition filed in the state court relative to the subsequent city charter assessment provisions, while pertinent there, are of no effect here. Therefore, the discussion in the fore part of page 47 of Appellees' brief should be disregarded.

Even though Appellant's rights were based upon the reassessment provision of the city charter, the case of *State v. Vancouver,* 160 Wash. 655, is not applicable. In that case an additional assessment was authorized "whenever on account of any mistake, inadvertence or other cause the amount assessed shall not be sufficient * * *." The court in that case applied the rule of *ejusdem generis* because the words "or other cause" followed the words "any mistake, inadvertance." The City of Birmingham charter provides for a reassessment "whenever for any cause, mistake or inadvertance the amount assessed shall not be sufficient." Therefore, inasmuch as the general term precedes the specific, the rule of *ejusdem generis* is not applicable.

The fact that the original special assessments were not paid, does not necessarily indicate that the lots are not

worth the amount of the assessments, as stated by Appellees on page 46 of their brief. These lots were sold at the 1938 tax sale because of an accumulated delinquency in the payment of general *ad valorem* taxes as well as in the payment of the special assessments. By reason of such sale and the subsequent so-called Scavenger Sale, these lots are now freed of any general tax obligation and also of the obligation growing out of the original special assessments. Even though an additional assessment may be levied against them, the total tax burden has been greatly decreased.

Appellees say that Section 15 of Chapter XXI of the village charter (R. 6) providing for an additional assessment, should not be applied except in those cases where the actual cost exceeds the estimate (Appellees' brief 45), or in any event should not be applied where the deficiency in the original assessment arises because the state in the exercise of its sovereign power has destroyed the assessment liens (Appellees' brief 46). They cite no authority for either of the above propositions nor do they go further than to state them.

Section 15 of Chapter XXI of the village charter specifies the condition for an additional assessment, in the following language:

> "Should any special assessment prove insufficient to pay for the improvement or work for which it was levied and the expenses incident thereto, the commission may make an additional pro rata assessment to supply the deficiency."

The charter authorized special assessments to defray improvement costs. The village had one of two alternatives—(1) to levy the special assessments and construct the improvement after the collection thereof, or (2) to levy

the assessments, borrow money by the issuance of special assessment bonds, and construct the improvement from the moneys so borrowed. In either case the cost of the improvement is the same.

The above quoted language does not limit the cause of the insufficiency. Appellees would have the court read into the charter provision a limitation upon the cause of the insufficiency. This would require the court to exercise legislative functions and insert by judicial decision such limitation, which of course it can not do.

Section 22 of Chapter XX of the village charter, after providing for the issuance of special assessment bonds, contained the following sentence:

> "Said bonds in no event shall be sold or otherwise disposed of at less than their par value."

Act 273, Public Acts of 1925, is the general law of Michigan governing the issuance of bonds by its political subdivisions. Section 2 of that act (Section 2691, C. L. 1929) as the same existed in 1928 and prior to its amendment in 1931, contained the following provision:

> "No bonds shall bear a higher rate of interest than 6% per annum or be sold at less than par and accrued interest."

Such provisions requiring bonds to be sold at not less than par, are inconsistent with any idea that the village did not intend to provide the means to pay those bonds in full. The chances of full payment would be questionable without the right to make an additional assessment inasmuch as there is always strong likelihood that some assessments may not be paid. Legal authority to provide for full payment of principal and interest is a necessary requisite to a sale at par.

In our original brief on pages 17 to 20, we cited and quoted from the opinions in the cases of *Kadow v. Paul*, 274 U. S. 175, *State ex rel. Frazer v. Holt County Court*, 135 Mo. 533 (375 S. W. 521) and *In Re Dancy Drainage District*, 190 Wis. 327 (208 N. W. 479), in which cases this and the other courts dealt with the question of additional special assessments necessitated by the failure of property owners to pay the original assessments. In those opinions the courts discussed and answered all the questions raised by Appellees under Point IV of their brief.

3.

Reply to Appellees' Argument Under Their Point II in re Statutory Provisions

The substance of Appellees' argument under their heading "Point II" is that Appellant's right to an additional assessment was also cancelled under laws existing prior to the 1937 and 1939 legislation and therefore Appellant's bond contract has not been impaired by that legislation.

Appellees in their brief, set forth on pages 16 to 21, inclusive, the various provisions of the tax laws relative to the disposition of property for non-payment of taxes and, on pages 24 to 40, inclusive, the various changes made therein by the 1937 and 1939 laws. In order to avoid any confusion, we desire at the outset to restate the fact that Appellant's claim as to unconstitutionality is limited to those provisions which cancel its right to an additional assessment, and which are set forth in its Specification of Errors. We are not here concerned with the other numerous changes in the tax laws except as they indirectly bear upon the issues before this court. The question, then, for immediate consideration can be stated as follows: What would have been the effect of the tax laws existing prior

to the 1937 and 1939 legislation, upon Appellant's right to an additional assessment, had the title of the state become absolute under such laws?

We repeat and emphasize what we said in our first brief, namely, that prior to the 1937 and 1939 legislation the only statutory provision which cancelled existing ta or the taxing power of a political subdivision, was Section 130 of the general tax laws (1 Comp. Laws, 1929, Section 3524) quoted in part on page 22 of our original brief. As to the effect of a tax deed to the state, this section provides:

> "All taxes charged against such lands in the office of the auditor general at the time they are deeded to the state shall be cancelled, * * *."

We pointed out on pages 24 and 25 of that brief that the additional special assessment claimed by Appellant, being yet unlevied, could not be a tax charged against the lands in the office of the Auditor General and therefore would not have been cancelled under said section. As to the future power to levy taxes against lands so deeded to the state, Section 130 prohibits such levies only until the lands are disposed of by the state.

To uphold Appellees' contention that Appellant's right to an additional assessment is cancelled irrespective of the 1937 and 1939 legislation, would require this court by judicial interpretation to legislate into Section 130, language which would extend the cancellation provisions thereof to taxes not charged in the office of the Auditor General, as well as those which were so charged, and to extend the exemption provisions thereof beyond the time of disposition by the state, in case of an additional assessment.

The cases cited by Appellees on page 22 of their brief, do not support their contention that the tax laws in exist-

ence in 1928, cancelled Appellant's right to an additional assessment. Those cases merely hold that under the former laws when property was deeded to the state under Section 127 (1 Comp. Laws, 1929, Section 3520), the title acquired by the state as between itself and any prior owner, was absolute; that thereupon former titles come to an end; and that after acquiring absolute title, the state can convey the property subject to reservations such as mineral rights, etc. None of the three cases so cited interpret the former tax laws as curtailing a municipal corporation in the exercise of its taxing power after a resale by the state.

The quotation from *Baker v. State Land Office Board*, 294 Mich. 587 (Appellees' brief 23), to the effect that "Inasmuch as the State is the absolute owner of the lands, the legislature is empowered to provide for the sale thereof in any way not prohibited by the Constitution" only introduces the issue in this case, namely: Does the Constitution prohibit the legislative acts here complained of?

From the position taken by the Appellees, one might infer that the purpose of the tax laws is to confer some benefit upon the property owner or to grant him some exemption from his obligations, rather than to provide a means for the enforcement of the payment by him of his fair share of the cost of government and of improvements to his property. The provisions of the tax laws relative to tax sales are for the purpose of compelling, not exempting, the payment of taxes. The tax sale procedure may result in the title being lodged in the state. Sections 127 and 130 of the general tax laws provided that in the event taxes should remain delinquent for five years and the land should have been bid in to the state for the taxes of one or more of such years, then the title would become absolute in the state for disposition by it in accordance with law; that existing taxes should be cancelled and that taxes should

not again be levied upon the property until it should be disposed of by the state; but that thereafter it would be subject to the levy of taxes the same as any other property. (1 Comp. Laws, 1929, Sections 3520, 3524.) The statute does nothing more (and nothing more is necessary to accomplish the purpose of the statute) than to cancel the taxes which at the time of the deeding to the state, had been levied and to prevent future assessment of taxes until the state sells the property. There is therefore no reason to read into said Section 130 any provision cancelling any tax which at the time of the deed to the state, is not charged against the lands in the office of the Auditor General (and an additional assessment could not be so charged prior to the levy thereof). Why should the court construe said Section 130 to exempt such property from an additional special assessment, whereas the property lying next thereto, whose owner has promptly met his obligations, is subject to such an additional assessment.

We therefore submit that had it not been for the passage of those provisions in the 1937 and 1939 legislation herein complained of, Appellant's right to a reassessment would not have been cancelled, and that it is the latter legislation only which cancels that right. The Michigan court evidently was of the same opinion.

Appellees have misconstrued our purpose in citing the case of *Case v. City of Saginaw*, 196 Mich. 687. We appreciate that the decision in that case, being by a divided court, is not a precedent. We rely not upon that case but upon the above referred to provisions of Section 130 of the general tax laws (1 Comp. Laws, 1929, Section 3524). We cited *Case v. City of Saginaw* as the only case considered by the Supreme Court of Michigan in any way involving the effect of a deed to the state upon special assessments, and also to show that the Michigan court

divided even upon the question of the effect of such a tax deed upon instalments of an *existing* assessment.

In answer to the statements made in Subdivision 3 beginning on page 41 of Appellees' brief, we suggest that the Appellant was not required under its contract to bid in the property at the tax sale, which would have required a bid equal not only to the special assessments, but also to the general taxes, nor to purchase at the Scavenger Sale which would have given the former owner the right to match its bid, but had the right to rely upon that part of its bond contract which provides an additional assessment to pay its bonds.

4.

Reply to Appellees' Argument Under Their Point I in re Reserved Sovereign Power

Appellees contend that the 1937 and 1939 legislation was enacted under the state's reserved sovereign power and is not subject to the limitations of the contract clause of the constitution and in support of this contention, they cite the cases of *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, and *Veix v. Sixth Ward Building and Loan Ass'n*, 310 U. S. 32, neither of which cases, in our opinion, sustain their position. The quotation from the *Blaisdell* case found on page 7 of their brief, is but a preliminary statement leading up to that found on page 439 of the reported opinion and which appears on page 38 of our former brief. In the latter statement, after declaring that the reserved power of the state and any limitations thereon (such as the contract clause) "must be construed in harmony with each other," the former Chief Justice of this court says:

> "This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them" (290 U. S. 439.)

It must be remembered, too, that the *Blaisdell* case was not dealing with the destruction of contract rights but with a statute which merely postponed the time when the mortgagee could obtain possession of the foreclosed property and which in the meantime protected his interests. The majority opinion in that case suggested that the statute was as much for the benefit of the mortgagee as the mortgagor.

In *Veix v. Sixth Ward Building and Loan Ass'n, supra*, cited by Appellees, this court was dealing with the constitutionality of the 1932 amendment to that part of the New Jersey building and loan association statute regulating the withdrawal by shareholders of their investments in such associations. Prior to the 1932 amendment, shares in such an association could be withdrawn upon not to exceed thirty days' notice, in the order in which notices were received, from not more than one-half of the receipts in any month, with right to sue at the end of six months. The principal changes made by the 1932 amendment were that if in any one month the funds required to be payable for withdrawals were insufficient to pay all required withdrawals, withdrawing members were to receive $500.00 each in order of priority until the fund for withdrawals was exhausted, and that so long as the funds of the association were applied as required by the amendment, no member could sue. The 1932 amendment was enacted subsequent to the time Veix purchased his shares in the association but prior to the time when he gave notice of withdrawal. The New Jersey statute was dealing with rights

as between the various members of the association. The events of the early thirties had revealed certain inequities in the rules governing withdrawals as set forth in previous statutes. As stated by the court the liquid portion of the assets of building and loan associations were being rapidly drained off by their customers, leaving long term investments and depreciated assets as an inadequate source for the payment of remaining liabilities. The act therefore was designed to prevent one shareholder being able to withdraw his entire investment before another shareholder whose means of locomotion perhaps did not permit him to reach the association's office quite as rapidly, could receive any part of his investment. In the *Veix* case the statute was attempting to equalize equities as between individual shareholders, while in the present case the 1937 and 1939 legislation, as interpreted by the Michigan court, created inequities as between property owners in the same assessment district by cancelling the right to levy an additional assessment in the future against the property of a delinquent taxpayer but not against the property of one who has promptly paid his tax obligations.

Appellees frequently cite and quote from *Baker v. State Land Office Board*, 294 Mich. 587. As we have stated before, the only question before the court in that case in respect to special assessments was whether or not the 1937 and 1939 legislation cancelled *assessments already in existence* at the time of the 1938 tax sale, even though some instalments thereof might be payable in the future. The court there was not in any way dealing with the right to an additional assessment which might be made at some future time after the property had again been restored to private ownership. This must be borne in mind in reading the various quotations from that case. Here we are concerned with a right, the exercise of which is made neces-

sary by the decision in the *Baker* case cancelling existing assessments.

Appellees attempt to distinguish the case of *W. B. Worthen Company v. Kavanaugh*, 295 U. S. 56, by saying at the top of page 14, that the statutes in that case were "well planned to make these benefit assessments an acceptable security." Are we to infer that the State of Michigan, in granting to villages the power to assess and re-assess (1 Comp. Laws, 1929, Section 1786) and the electors of the Village of Birmingham in providing for an additional assessment in their charter, did not plan to make the bonds in question an acceptable security? Are we to infer that the Village of Birmingham intended that the additional assessment provision of its charter, was only a sham? Appellees further attempt to distinguish the *Worthen* case by saying that the Arkansas legislation was enacted in a spirit of oppression (page 14). No such statement was made by this court. The court did say: "Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bonds must be respected" (295 U. S. 56 at 60).

We repeat again that in our opinion the decision of the Michigan Supreme Court can not be affirmed by this court without the reversal of the decision in *W. B. Worthen Company v. Kavanaugh, supra.*

III.
CONCLUSION

In conclusion we state:

(1) That under the provisions of Section 15 of Chapter XXI of the charter of the Village of Birmingham (the effective charter at the time of the issuance of the bonds), Appellant is entitled to an additional pro rata assessment to supply the deficiency in the special assessment bond fund.

(2). That the statutes existing at the time of the issuance of Appellant's bonds, did not cancel its right to an additional assessment, inasmuch as such statutes cancelled those taxes only which were charged against lands in the office of the Auditor General at the time of the deeding of the same to the state (1 C. L., 1929, Sec. 3524).

(3) That the cancellation effected by the 1937 and 1939 legislation destroys Appellant's sole remedy and therefore impairs the obligation of its contract and deprives it of property without due process of law, contrary to the Federal Constitution.

(4) That to affirm the decision of the Michigan Supreme Court would require this court to reverse its decision in *W. B. Worthen Company v. Kavanaugh*, 295 U. S. 56.

(5) That the reserved sovereign power of the state does not permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398 at page 439.

(6) That we are not contending that the 1937 and 1939 legislation be declared unconstitutional in its entirety but only as it attempts to cancel the right to an additional

assessment under the circumstances of this case where there remains no other remedy.

(7) That an additional assessment to meet deficiencies in a special assessment bond fund, where the original assessments have been cancelled, is in the same category as a future *ad valorem* tax to meet a deficiency in a general obligation bond fund, where the original taxes have been cancelled. To permit the state to cancel the one would permit it to cancel the other and the result would be general repudiation of bonded indebtedness.

(8) That even though the state is unable to cancel the right to an additional assessment, the property in question still will have received the benefits of the cancellation of an accumulation of approximately ten years of *ad valorem* taxes.

(9) That it would be unfair to permit the owners of the lots in question to enjoy the benefits of the improvements without contributing to the payment thereof.

(10) That the legislation herein attacked, attempts to confer a benefit upon certain property owners at the expense of bondholders and other property owners.

We therefore submit that the judgment of the Supreme Court of the State of Michigan should be reversed:

CLAUDE H. STEVENS,
Attorney for Appellant,
1000 Penobscot Building,
Detroit, Michigan.

BERRY AND STEVENS,
Of Counsel.

FILE COPY.

Office - Supreme Court U. S.
FILED
MAR 5 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Appellant,

vs.

CITY OF BIRMINGHAM,
A Municipal Corporation, et al.,
Appellees.

BRIEF OF APPELLEES

FERRIS D. STONE,
FREDERIC S. GLOVER, JR.,
HARRY ALLEN,
Counsel for the Appellees except the State of Michigan

HERBERT J. RUSHTON,
Attorney General of the State of Michigan,
Counsel for the State of Michigan,
Intervening Defendant and Appellee.

ECLIPSE COMPOSITION COMPANY, 243 W. LARNED ST., DETROIT

SUBJECT INDEX

		PAGE
I.	REPORT OF OPINIONS OF THE STATE COURT	1
II.	GROUNDS OF JURISDICTION	1-3
III.	STATEMENT OF CASE	3-4
IV.	ARGUMENT	5-47
	Summary of Argument	5-6
	Point I. The Legislation in Question Is in the Exercise by the State of its Reserved Sovereign Power Which Is Read Into All Contracts	7-15
	Point II. The Changes Made in the Michigan Tax Laws by the Statutes of 1937 and 193[illegible] Do Not Impair the Contract Rights of Plaintiff	16-42
	A. The Relevant Provisions of the Michigan Tax Laws in Effect When Appellant's Bonds Were Issued	16-20
	Summary of Relevant Provisions of General Property Tax Law in Effect When Appellant's Bonds Were Issued	21

PAGE

B. Nature of Title Acquired By State of Michigan 22-24

C. Analysis of the Changes Made By the 1937 and 1939 Legislation Claimed to Be Unconstitutional 24-42

1. Amendments to General Property Tax Law 25-35

2. The Effect of the So-called Scavenger Act 35-40

3. Appellant Had Notice of the Changes in the Statutes in Ample Time to Protect Itself by Bidding at the Tax Sales 41-42

Point III. The Michigan Statutes Should Not Be Declared Unconstitutional as Applied to Appellant Because It Is Doubtful Whether the State of Michigan Can Dispose of the Lots if the Purchaser Must Take Them Subject to the Right of Reassess 43-44

Point IV. Appellant's Right to Reassessment Is Not Clear in Any Event Under the Wording of the Village and City Charters 44-47

CONCLUSION 48

Table of Cases Cited

	PAGE
Auditor General v. MacKinnon Boiler Co., 199 Mich. 489	34
Baker v. State Land Office Board, 294 Mich. 587	8, 10, 12, 15, 23, 35, 37
Case v. City of Saginaw, 196 Mich. 687	6, 31, 32, 33, 34, 38, 39
Grand Rapids Trust Co. v. Doctor, 222 Mich. 248	22
Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398	5, 7, 11
Ingraham v. Hanson, 297 U. S. 378	41
Indiana ex rel. Anderson v. Brand, 303 U. S. 95	3
International Steel Co. v. National Surety Co., 297 U. S. 657	3
Irving Trust Co. v. Day, 86 Law. Ed. 349	44
Krench v. State of Michigan, 277 Mich. 168	22
People ex rel. Auditor General v. Ingalls, 238 Mich. 423	43
Pesciarelli v. Trestain, 288 Mich. 89	9
Rathbun v. State of Michigan, 284 Mich. 521	22
Schnitz v. Grand River Avenue Development Co., 271 Mich. 253	9
State v. Vancouver, 160 Wash. 655	47
Stephenson v. Binford, 287 U. S. 251	7
Veix v. Sixth Ward Building & Loan Ass'n, 310 U. S. 32	11, 12
James A. Welch Co., Inc. v. State Land Office Board, 295 Mich. 85	15
W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56	13, 14

Table of Statutes, Charters and Constitutions Cited

	PAGE
1 Michigan Compiled Laws 1929—	
Sections 3451 and following	8
Sections 3500-3501	16
Sections 3389-3551, inc.	16
Section 3448	16
Sections 3451-3470, inc.	16
Section 3451	17, 41
Section 3452	17
Sections 3453-3454	18
Section 3458	18
Section 3459	18
Section 3462	18
Section 3467	18, 29
Section 3471	19
Section 3477	19
Section 3478	19
Section 3520	19, 30
Section 3524	20
Section 3526	37
Section 3527	20, 40
Mason's 1940 Supplement to Compiled Laws 1929—	
Section 3459	25
Sections 3723-1 through Sections 3724-14	36
Michigan Public Acts—	
Act No. 262, Public Acts 1899	28
Act No. 206, Public Acts 1893, as amended (General Property Tax Law)	8
Section 57	16
Sections 60 to 77, inc.	16, 17

PAGE

Section 60 ..... 17, 21, 41
Sections 61 to 71, inc. 21
Section 67 ..... 25, 26, 28, 30, 35
Section 70 21
Section 74 ..... 18, 21, 29, 30
Section 78 ..... 19, 21
Section 84 ..... 19, 21
Section 85 19
Section 127 ..... 19, 20, 21, 33
Section 130 ..... 20, 21, 33, 38
Section 131 ..... 20, 21, 33

Act No. 114, Public Acts 1937 ..... 80, 10, 13, 24, 25, 26

Act No. 155, Public Acts 1937 ..... 5, 8, 10, 13, 24, 32, 35
Section 7 36
Section 9 ..... 35, 37, 38
Section 10 ..... 32, 34, 35, 39

Act No. 325, Public Acts 1937 ..... 10, 13, 24, 29

Act No. 29, Public Acts 1939 ..... 5, 8, 24, 35

Act No. 244, Public Acts 1939 ..... 5, 8, 13, 24, 32, 35

Act No. 282, Public Acts 1939 ..... 8, 24, 25

Act No. 329, Public Acts 1939 ..... 5, 8, 13, 24, 35

Municipal Charters—
Charter of the Village of Birmingham 45
Charter of the City of Birmingham 47

United States Constitution—
Article I, Section 10 ..... 2, 7, 10, 13
Fourteenth Amendment 2, 10, 13

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Appellant,

vs.

CITY OF BIRMINGHAM,
A Municipal Corporation, et al.,
Appellees.

BRIEF OF APPELLEES

I.

REPORT OF OPINIONS OF THE STATE COURT

This is an appeal from an order entered by the Supreme Court of the state of Michigan on June 30, 1941, denying to Appellant a writ of mandamus, which order was based upon opinions reported in 298 Michigan 314-330.

II.

GROUNDS OF JURISDICTION

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked by Appellant are stated on pages 2 and 3 of its brief and in the Jurisdic-

tional Statement previously filed and printed. Appellant claims in this appeal that as construed by the Supreme Court of Michigan certain 1937 and 1939 Michigan statutes impair the obligation of Appellant's contract right as the holder of special assessment bonds to an additional assessment and deprive Appellant of its property without due process of law. We agree that these constitutional questions were properly raised in the court below (R. 17-18) and were decided in favor of the validity of the statutes by the Supreme Court of Michigan (R. 22, 25).

Appellees did not file statements opposing the jurisdiction of this Court, having been of the opinion that the federal questions involved on this appeal were of a substantial nature.

The court below did not pass upon the possible defense that Appellant would not have had the right to reassess even if no consideration were given to the 1937 and 1939 legislation under attack on this appeal. If the Supreme Court of Michigan had decided that no right to a reassessment existed even if the 1937 and 1939 statutes were disregarded, then there would have been no federal question from which the plaintiff could have appealed to this Court because the judgment below would have had a non-federal ground adequate to support it. The Supreme Court of Michigan did not, however, decide this non-federal question, but based its decision upon the provisions of those statutes which are attacked by the Appellant as invalid under the Constitution of the United States.

It would seem, therefore, that this case is within the settled rule of this Court that where the state court has not passed upon a possible ground of defense which ap-

pears to involve no federal question this Court will decide the substantial federal questions and, if it reverses the state court on those questions, will not give final judgment but will remand to the state court to decide the non-federal question.

Indiana Ex Rel. Anderson vs. Brand, 303 U. S. 95;
International Steel Company vs. National Surety Company, 297 U. S. 657.

We are, therefore, of the opinion that this Court has jurisdiction to decide the federal questions raised on this appeal. If these questions are decided in favor of Appellants this Court should not give final judgment but should remand the case to the Supreme Court of Michigan to decide the non-federal question as to whether any right of reassessment exists apart from the unconstitutional provisions of the 1937 and 1939 statutes. If the federal questions are decided in favor of Appellees this Court will, of course, give final judgment of affirmance.

III.
STATEMENT OF CASE

We accept the statement of the case set forth in pages 4 to 10 of the brief for Appellant except that the Attorney General of Michigan wishes to add the following matters which he considers material:

This case was decided below upon the pleadings, no evidence having been offered by any of the parties.

It is alleged in the answer of the Attorney General of Michigan (R. 16) that the successful bidder at the State Land Office Board sale had not yet executed the contract for the purchase of the lots and that the time for the execution of the land contract has been from time to time extended, the final agreement between the bidder and the State Land Office Board being that said contract should not be signed until the Supreme Court of Michigan had decided this case. The Attorney General also alleged that the successful bidder takes the position and so informed the State Land Office Board that it will not execute the said land contract but will relinquish its rights under its bid and application in the event that the City of Birmingham reassessed the paving tax upon the lots in question.

The Attorney General further alleged that he had been informed and believed that the members of the State Land Office Board apprehended that if the successful bidder did relinquish its rights that other purchasers of lots on land contract will rescind their agreements and title to the property will again become vested in the state of Michigan (R. 16).

These allegations of the answer of the Attorney General of Michigan were admitted by the appellant in paragraph 3 of its reply (R. 17-18), but it denied that the circumstances alleged by the Attorney General constituted a defense to the Appellant's petition for mandamus (R. 17). Appellant also pointed out that the purchaser had not yet surrendered its rights nor had the State Land Office Board yet released it from its obligations as purchaser (R. 17, 18).

IV.
ARGUMENT

SUMMARY OF ARGUMENT

The argument of Appellees in support of the judgment of the Supreme Court of Michigan may be thus summarized:

1: The legislation in question was passed in the exercise of that "residuum of state power" which is read into all contracts "as a postulate of the legal order". (Quotations are from opinion of Hughes, C. J., in *Home Building & Loan Ass'n. v. Blaisdell*, 290 U. S. 398, at 435).

2: The changes made in the tax laws of the state of Michigan by the statutes of 1937 and 1939 affect only the remedy for the collection of plaintiff's bonds and do not impair their obligation.

(a) The amendments to the General Tax Law changed the time and manner of acquisition of absolute title by the state of Michigan to lands sold for delinquent taxes but did not substantially change the nature and legal effect of the state's title when acquired.

(b) The so-called Scavenger Act (Act 155 of the Public Acts of Michigan of 1937, as amended by Acts 29, 244 and 329 of the Public Acts of 1939) changed the method of disposition by the state of tax lands to which it had acquired absolute title, but did not prejudice Appellant's

contract rights for the reasons: (1) that the state of Michigan has always had the right to dispose of its absolute property in such manner and upon such terms as the legislature might provide, (2) that the only Michigan decision lending any support whatever to Appellant's contention that it has a vested right under the old law is *Case v. City of Saginaw*, 196 Mich. 687, which was decided by an equally divided court, has not been followed, and is readily distinguishable from the present case, and (3) that if the old law had been followed instead of the new the Appellant would have been in no better position than it is now.

3: The Michigan statutes should not be declared unconstitutional upon the showing made by Appellant in this case because the effect upon it of the decision of the Supreme Court of Michigan is purely speculative since it is doubtful whether the state could dispose of these lots if the purchaser has to take them subject to the burdensome reassessments and they are admittedly not subject to reassessment while owned by the state.

4: Appellant's right to reassessment is not clear in any event under the wording of the village and city charters.

POINT I.

THE LEGISLATION IN QUESTION IS IN THE EXERCISE BY THE STATE OF ITS RESERVED SOVEREIGN POWER WHICH IS READ INTO ALL CONTRACTS

This Court has on many occasions recognized that Section 10 of Article I of the Constitution of the United States does not prevent the enactment by the states of legislation appropriate to safeguard the vital interests of their people. Perhaps the most effective statement of this is that of Chief Justice Hughes in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, at 434-5:

> "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford*, 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

The law of Michigan governing the sale, redemption and conveyance of delinquent tax lands in effect at the time Appellant's bonds were issued in 1928 is found in

Section 3451 and following of the Compiled Laws of 1929, being Sections 60 and following of the so-called General Property Tax Law, Act No. 206 of the Public Acts of 1893 as from time to time amended. These sections are summarized under Point II of this brief (*infra* pp. 16-21).

The legislation which Appellant claims to be unconstitutional as construed by the Supreme Court of Michigan in this case consists of certain 1937 and 1939 amendments to the General Property Tax Law embodied in Act No. 114 of Public Acts of 1937 and Act No. 282 of Public Acts of 1939 and also new legislation embodied in Act No. 155 of Public Acts of 1937 as amended by Act Nos. 29, 244 and 329 of the Public Acts of 1939 providing for a new procedure for the sale of delinquent tax lands, title to which has become absolute in the state of Michigan. Act No. 155 of the Public Acts of 1937 as amended is popularly known as the "Scavenger Act" and is sometimes referred to by that name in this brief. These 1937 and 1939 statutes are considered in detail under Point II of this brief (*infra*, pp. 24-42).

The 1937 and 1939 amendments to the General Property Tax Law and the Scavenger Act must be construed together because they are each an integral part of the plan whereby the legislature attempted to deal with the desperate problem of delinquent taxes which confronted it in 1937. The legislative background and history of these statutes was graphically described by Mr. Justice McAllister in *Baker v. State Land Office Board*, 294 Mich. 587 at 592-594:

> "Between the years 1920 and 1930 speculative activities in real estate in the State, unrestrained

by normal caution and on a scale unparalleled, had resulted in platting of subdivisions with building lots sold at highly inflated prices. The same exaggeration seeped into farm lands and business properties in cities. During this period municipalities and their officials encouraged the speculative movement by approval, in undeveloped areas, of widespread improvements, including sewer extensions, sidewalks, and pavements. The entire movement was pervaded by an enthusiasm uncolored by moderation. But all of these plans and hopes collapsed under the pitiless and inexorable advance of economic depression, of which this court has on several occasions taken judicial notice. *Schnitz v. Grand River Avenue Development Co.*, 271 Mich. 253; *Pesciarelli v. Trestain*, 288 Mich. 89. Vestiges of these shattered dreams of wealth survive in spectral outlines of cities now crumbling to ruin in remote country fields, and the omniscient eye of retrospection finds it is easy to survey the past and call it unwise.

"The result of this activity was that taxes on excessively high assessments became delinquent and accumulated in amount until they greatly exceeded the assessed valuation. For approximately six years subsequent to 1932, no tax sales were held; moratorium statutes were passed by the legislature, embodying waiver of interest and penalty charges, and providing for payment of taxes in instalments covering a 10-year period; but such efforts to effect payment were in vain, and the unpaid taxes accumulated until in some counties they exceeded five times the amount of the assessed valuation of the property. Planning commissions, which occupied themselves with a possible solution of the problem, were appointed by the governor, and concluded that the various plans to remedy the situation had failed to stop the abandonment of tax-delinquent land; and legislative committees made exhaustive studies in an effort to devise means of overcoming the rapidly growing peril which was assuming catastrophic

form. The result was the enactment of Act No. 155, Pub. Acts 1937, and the amendment of the general property tax law by Acts Nos. 114 and 325, Pub. Acts 1937."

In *Baker v. State Land Office Board, supra,* the constitutionality of the 1937 and 1939 amendments to the General Property Tax Law and of the Scavenger Act was upheld against attack on the grounds, among others, that these statutes would impair the obligation of the contracts of special assessment bondholders and would deprive such bondholders of their property without due process of law contrary to the applicable provisions of the constitutions of the state of Michigan and of the United States. The Supreme Court of Michigan held that the statutes in question did not contravene the contract or due process clauses of the state and federal constitutions because: (1) laws of retroactive character affecting tax liens which attached prior to their enactment are not unconstitutional nor do statutes affecting such liens and shortening the time previously fixed for sale or redemption impair contract obligations or vested rights but only affect the remedy for the delinquency of the taxpayer (*Baker v. State Land Office Board, supra,* at 599) and (2) purchasers of special assessment bonds "can be assumed to have purchased with knowledge that the lien upon the property securing such taxes and assessments might be displaced" (*Baker v. State Land Office Board, supra,* at 599).

Under Point II of our argument (*infra,* pp. 16-42) we have examined in detail the changes effected by the amendments to the General Property Tax Law and by the Scavenger Act and have shown that their effects upon Appellant are no different than those considered by the Supreme

Court of Michigan in the *Baker* case. The reasoning of the Supreme Court of Michigan in the *Baker* case upholding their constitutionality is equally applicable to this case.

But it is not essential to our case that this court adopt the reasoning of the Supreme Court of Michigan. Recent decisions of this Court itself clearly sustain the legislation. Under these decisions the reserved police powers of the states are not limited to matters of health, morals, and safety but extend to economic needs as well, and all contracts are subject to these paramount powers.

Veix v. Sixth Ward Building & Loan Ass'n. 310 U. S. 32.
Home Building & Loan Ass'n. v. Blaisdell, 290 U. S. 398, *supra.*

In *Veix v. Sixth Ward Bldg. & Loan Assn., supra,* this Court held that the legislature of New Jersey could change withdrawal rights of members of building and loan associations without impairing their contracts because the legislation in question "was passed in the public interest to protect the activities of the associations for the economic welfare of the State" (310 U. S. 32, at 37).

Such changes did not impair the obligation of contracts "because the obligation of the Association to respond to the application for withdrawal was subject to the paramount police power" (310 U. S. 32, at 38). The authority retained by the states over contracts "is not limited to health, morals and safety. It extends to economic needs as well" (310 U. S. 32, at 38-9).

The fact that the legislation was permanent in character and not temporary was not considered significant in determining its status under the contract clause.

"If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue. • • • Such legislation may be classed as emergency in one sense but it need not be temporary" (310 U. S. 32, at 39-40).

We submit that under this Court's decision in *Veix v. Sixth Ward Bldg. & Loan Assn., supra*, the state of Michigan clearly had the power to make the reasonable and appropriate changes in the tax laws made by the legislature in 1937 and 1939 for the general economic welfare of the state regardless of the effect such legislation may have had on rights of special assessment bondholders.

Appellant argues in its brief (pp. 30-33) to the effect that the legislation in question was an attempt by the Michigan legislature to grant special favors to former owners of the property to the prejudice of bondholders. A similar argument was advanced in *Baker v. State Land Office Board*, 294 Mich. 587, and was convincingly disposed of by the Michigan Supreme Court in the following language:

> "That the statute in question is a mere subterfuge to cancel taxes and assessments, and to enable owners to escape their obligations to the governmental taxing authorities, is next advanced as an argument by petitioner. It is claimed that the act arbitrarily discriminates between rights and privileges of former owners, rights of municipalities, and strangers to the title, who bid at such sales. If

the former owner matches the bid of another, he is awarded the right of purchase. The State receives as much from one as it would from the other. It might well be the opinion of the legislative body that the former owner, once he was relieved of the weight of accumulated obligation, had a greater interest in maintaining the land as a taxpaying property than an outsider. Furthermore, there would seem to be no illegal consideration in granting municipalities a year's delay in order that they might acquire properties incumbered by taxes owed to them. The superiority of their interest and the public interest warrants such consideration; and to all of such contentions, it might well be answered that the primary and inducing purpose of the legislation was to secure a portion of the unpaid taxes, rather than nothing, and to restore lands to a taxpaying basis, instead of supinely allowing them to accumulate tax delinquencies with no hope of ever recovering them. In accordance with the foregoing, it is our determination that there has been no showing of unconstitutional discrimination or classification in the provisions of Act No. 155, Pub. Acts 1937; that Act No. 206, Pub. Acts 1893, as amended by Act No. 114, Pub. Acts 1937, does not contravene either the State or Federal Constitution as an *ex post facto* law, or impair the obligations of contract; and that the amending statutes, Act No. 244, Pub. Acts 1939, Act No. 325, Pub. Acts 1937, and Act No. 329, Pub. Acts 1939, are not invalid for the reasons as set forth and contended by petitioner'' (pp. 605-6).

Appellant places great reliance upon the decision of this Court in *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 56 in which an Arkansas statute was held invalid as impairing the obligation of bondholders' contract. The legislation in the *Worthen* case is readily distinguishable from the Michigan legislation involved here. The bonds

involved in that case were issued under special statutes "well planned to make these benefit assessments an acceptable security" (295 U. S. 56, at 57). The statutes declared invalid were amendments which changed the whole plan to enforce payments of assessments, making the enforcement much more lengthy and burdensome. In the language of Mr. Justice Cardozo:

> "Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected" (295 U. S. 56, at 60).

The Arkansas legislation clearly did not respect these bounds of moderation or reason but were enacted in a spirit of oppression. In the language of Mr. Justice Cardozo:

> "A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor" (295 U. S. 56, at 60).

In contrast to the Arkansas legislation held invalid in the *Worthen* case, the Michigan statutes here attacked were enacted to meet a state-wide situation which threatened to paralyze the processes of government.

In the language of the Supreme Court of Michigan:

> "The primary and inducing purpose of the legislation was to secure a portion of the unpaid taxes,

rather than nothing, and to restore lands to a taxpaying basis, instead of supinely allowing them to accumulate tax delinquencies with no hope of ever recovering them" (*Baker v. State Land Office Board*, 294 Mich. 587 at 606).

The Michigan legislature, therefore, acted not in a "spirit of oppression" but rather with an enlightened view of the public welfare of the state. Its purpose could not have been accomplished if state lands could only be sold subject to the burden of reassessments for past improvements for which the original excessive assessments had been the very cause of the tax delinquencies. The state clearly had the power to deal with the situation in the way it did. The language of Mr. Justice Chandler in the court below can scarcely be improved upon as a statement of our position:

> "The clear import of the language of the foregoing amendatory enactments, and the obvious intent and purpose of the legislature to relieve owners from the weight of accumulated obligation, *James A. Welch Co., Inc. v. State Land Office Board*, 295 Mich. 85, must lead one to the conclusion that when title to the lots here in question became absolute in the state of Michigan upon expiration of the period of redemption provided by the tax law free of all taxes and other liens and incumbrances of whatever kind or nature, and future and deficiency as well as past assessments and taxes were cancelled. To hold otherwise would defeat the purpose of this remedial legislation by a narrow and unwarranted construction, and would once again give rise to the vicious circle of assessment based upon inflated valuation; refusal or inability of the owner to pay; followed by a sale of the premises pursuant to the state's sovereign power of enforcing the collection of taxes" (R. 24).

POINT II.

THE CHANGES MADE IN THE MICHIGAN TAX LAWS BY THE STATUTES OF 1937 AND 1939 DO NOT IMPAIR THE CONTRACT RIGHTS OF PLAINTIFF

A. The Relevant Provisions of the Michigan Tax Laws in Effect When Appellant's Bonds Were Issued.

Under the charter of the village of Birmingham delinquent special assessments, along with delinquent village taxes, were returned to the county treasurer for collection under the General Property Tax Law (R. 5). Thereafter the General Property Tax Law relative to the collection of such special assessments and the sale and redemption of property for the non-payment thereof were applicable (1 Compiled Laws 1929, Sec. 3500-3501; Appellant's Brief, p. 21).

The applicable provisions of the General Property Tax Law in effect when Appellant's bonds were issued (Act No. 206 of the Public Acts of 1893, as amended; 1 Compiled Laws 1929, Sec. 3389-3551 incl.) may be summarized as follows:

1. Section 57 (1 Compiled Laws 1929, Sec. 3448) required the county treasurer to forward to the Auditor-General a corrected transcript of all taxes on land returned as tax delinquent to his office, such transcript to be furnished by the first day of May after the return of the delinquent taxes to the county treasurer.

2. Sections 60 to 77 inclusive (1 Compiled Laws 1929, Sec. 3451 to 3470 incl.) provided the procedure whereby

all lands which had been returned delinquent to the Auditor-General and upon which any taxes were unpaid for the period of one year or more were subject to disposition, sale and redemption for the enforcement and collection of such tax liens. It is significant that Section 60 (1 Compiled Laws 1929, Sec. 3451) contained this important sentence:

> "In the disposition and sale of such delinquent tax lands the people of the state of Michigan shall be deemed to have a valid lien upon such lands, with all the rights to enforce the same as a preferred or first (1st) claim upon such lands, and the rights and choses to enforce such lien shall be held and construed by all the courts of this state as the prima facie rights of the state, and shall not be set aside or annulled except in the manner and for the causes herein specified."

The quoted sentence granting the state of Michigan a preferred first lien upon such lands has been embodied in the General Property Tax Law ever since its enactment in 1893 and, of course, any purchaser of special assessment bonds is charged with knowledge thereof.

(a) The procedure for enforcing this first lien is initiated by petition filed by the Auditor-General in the office of the county clerk in each county in which lands are to be sold at the annual tax sale, praying for a decree in favor of the state of Michigan against the lands described in the lists or schedules attached to the petition and praying further that in default thereof such lands be sold (1 Compiled Laws 1929, Sec. 3452). A statutory form of notice is sent to the taxpayer by the county treasurer and a statutory form of order is thereafter to be entered by the circuit judge setting the date for hearing the Auditor-General's petition and

providing for the sale of all lands described in the petition for which a decree of sale shall be made, such sale to be held on the first Tuesday in May thereafter or on the day or days subsequent thereto as may be necessary to complete the sale of all such lands (1 Compiled Laws 1929, Sec. 3453-3454). The petition and order must be published and such publication is made equivalent to personal service of notice on all persons interested in the lands specified in the petition and gives the court jurisdiction to hear the petition, determine the questions arising thereon and to decree a sale of such lands for the payment of all taxes, interest and charges thereon (1 Compiled Laws 1929, Sec. 3458). After the hearing a decree is entered in statutory form (1 Compiled Laws, 1929, Sec. 3459).

(b) On the first Tuesday of May of each year the county treasurer is required to commence the sale of lands mentioned in the decree (1 Compiled Laws 1929, Sec. 3462). Each parcel described in the decree is separately offered for sale and if any parcel cannot be sold for the amount of the delinquent taxes, interest and charges the county treasurer "shall bid off the same in the name of the state, for the state, county and township, in proportion to the taxes, interest and charges due each." It is further provided that "all lands bid off in the name of the state shall continue liable to be taxed in the same manner as if they were not the property of the state, except as hereinafter provided" (1 Compiled Laws 1929, Sec. 3462).

(c) Section 74 (1 Compiled Laws 1929, Sec. 3467) granted to any person owning any of the

lands so sold or any interest therein the right to redeem any parcel at any time before the first Tuesday in May in the year following the sale.

3. Section 78 (1 Compiled Laws 1929, Sec. 3471) provided that all land bid off to the state for taxes which had not been redeemed or otherwise disposed of should continue to be offered for sale each year by the county treasurer at the regular annual tax sale.

4. Section 84 (1 Compiled Laws 1929, Sec. 3477) gave any person the right to purchase any state tax lands or any state bids at any time except during the time of the annual tax sale and 15 days prior thereto by paying the amount of the state bid and interest and by paying any other taxes which had been returned delinquent to the Auditor-General and remained a lien on the land, provided that during the one year redemption period any state bid could be purchased without payment of the taxes of subsequent years if the land was not also held by the state as state tax land.

5. Section 85 (1 Compiled Laws 1929, Sec. 3478) provided that no sale of state tax lands or state bids should prejudice the right to enforce the collection of any tax for subsequent years for which the Auditor-General must continue to offer the lands for sale in regular succession at the next ensuing annual tax sales.

6. Section 127 (1 Compiled Laws 1929, Sec. 3520) among other things provided with respect to lands delinquent for taxes for any five years which had been sold and bid off to the state for any one of those years and not redeemed,

purchased or the subject of pending litigation, that "title to the state shall be deemed absolute in and to said lands", and such lands should thereafter be subject to disposition as therein provided after examination by the Auditor-General and the director of conservation to determine what lands came within the provisions of said Section 127. Within 90 days after such determination all lands subject to Section 127 should be deeded by the Auditor-General to the state of Michigan, with certain exceptions not important here.

7. Section 130 (1 Compiled Laws 1929, Sec. 3524) provided, and still provides, that all taxes charged against such lands in the office of the Auditor-General at the time they are deeded by him to the state shall be cancelled, and that the "state, county and township respectively shall bear the share of the loss on such taxes that properly belongs to each." The assessing officers are directed to remove and cancel such lands from the assessment rolls.

8. Section 131 (1 Compiled Laws 1929, Sec. 3527) provided for the disposition of such lands, with certain reservations, by the director of conservation as state tax homestead lands. One who applied for homestead entry was entitled to purchase for ten cents an acre. If no homestead application was made an appraisal had to be made and the director of conservation could sell and convey such lands at not less than the appraised valuation. The purchase money was credited to the state, county and township in proportion to the amounts due each for taxes on the land at the time it was deeded to the state.

Summary of Relevant Provisions of General Property Tax Law in Effect When Appellant's Bonds Were Issued.

The foregoing sections of the General Property Tax Law may be further summarized as follows (References are to sections of the General Property Tax Law):

The people of the state of Michigan had a preferred first lien upon all delinquent tax lands (Sec. 60). Lands returned delinquent to the county treasurer and reported by him to the Auditor-General were to be offered for sale by the county treasurer in May of each year upon petition of the Auditor-General and decree of the circuit court. (Secs. 61-71 inclusive). Lands not sold to private bidders were to be bid off to the state but continued to be taxed in the same manner as if they were not the property of the state (Sec. 70), and unless redeemed continued to be offered at succeeding annual tax sales (Sec. 78). A one year redemption period was provided for (Sec. 74), but anyone, including former owners, could thereafter repurchase from the state (Sec. 84) until the lands had been delinquent for five years and sold to the state for any one of those years, whereupon title was to become absolute in the state and the lands were to be deeded to the state by the Auditor-General after examination and determination by him and the director of conservation (Sec. 127). All taxes charged against such lands in the office of the Auditor-General at the time they were deeded by him to the state were expressly cancelled and such lands were directed to be removed from the assessment rolls (Sec. 130), and were thereafter to be subject to disposition as state tax homestead lands by the director of conservation either to homesteaders at ten cents an acre or to purchasers at not less than the appraised value, as provided in Sec. 131.

B. Nature of Title Acquired by State of Michigan.

The title thus acquired by the state cut off all prior title and even a former owner thereafter acquiring the lands from the state obtained a new title not related to his old one.

Grand Rapids Trust Company v. Doctor, 222 Mich. 248.

In that case it was held that one who had been in adverse possession of land for more than the statutory period of 15 years did not acquire title, for the reason that the state had held title for part of the period, although the former owner had reacquired the title from the state; the court in considering the nature of the former owner's title reacquired from the state, said at page 253:

> "Under these proceedings the former owner becomes a stranger to the title to the lands so forfeited and deeded to the State. The State takes absolute title to the same in consideration of the taxes he owed, and relieves him from any obligation to pay further taxes thereon."

To the same effect is *Krench v. State of Michigan*, 277 Mich. 168, in which it is stated at page 179:

> "The State held title in fee simple. The original title had come to an end and a new chain of title originated with the State."

In *Rathbun v. State of Michigan*, 284 Mich. 521, at 539, the court said:

> "By the foregoing provisions there can be no doubt that after the period of redemption of the

> property bid off to the State for delinquent taxes, the state receives the absolute title to such lands."

Being the absolute owner, the state has the power to dispose of lands in any way not prohibited by its constitution.

Baker v. State Land Office Board, 294 Mich. 587; *supra*,

in which the court said at page 602:

> "Former owners are granted certain rights as bidders and purchasers, but the sale is of land, title to which is vested in the State; and inasmuch as the State is the absolute owner of the lands, the legislature is empowered to provide for the sale thereof in any way not prohibited by the Constitution."

In holding that the legislature of the state of Michigan had the power to determine in what manner lands owned by the state shall be sold the Supreme Court of Michigan was not giving effect to new legislation or case law subsequent to the issuance of Appellant's bonds but was recognizing that such had been the well settled law of Michigan long before 1928. Whether the legislature has imposed conditions prohibited by the state constitution is, of course, a question of state law which has been conclusively decided against the contentions of Appellant, both in the *Baker* case and in the present case in which Mr. Justice Chandler said (R. 25):

> "The Legislative body of the State has determined in what manner lands owned by the State shall be sold. In a long and able opinion to which reference has been made the constitutionality of this legislation was upheld, and having determined

that the right to make any further special deficiency assessments as well as actual assessments made are totally and completely extinguished and cancelled, it follows that petitioner's demand for a writ of mandamus should be and is denied."

It having been the law of Michigan prior to the issuance of Appellant's bonds that the state could dispose of its absolute property upon any conditions that it might determine within constitutional limits and the present legislation having been upheld as being within those limits, it is difficult to see how the Appellant can claim the protection of any provisions of the federal constitution. The legislature in enacting the present statutes was merely exercising a power which it had at the time the bonds were issued. The exercise of this power certainly cannot impair the contract of the bondholders because the law existing at that time is read into the bonds as part of their obligation.

C. Analysis of the Changes Made by the 1937 and 1939 Legislation Claimed to be Unconstitutional.

We shall examine the statutes which Appellant claims to be unconstitutional to determine if the obligation of Appellant's bonds is impaired thereby. We shall consider this legislation under two headings (1) the amendments to the General Property Tax Law contained in Public Acts Nos. 114 and 325 of 1937 and Act No. 282 Public Acts of 1939, and (2) the so-called Scavenger Act, being Act No. 155 Public Acts of 1937 as amended by Acts Nos. 29, 244 and 329 Public Acts of 1939.

1: *Amendments to General Property Tax Law.*

In the Specification of Errors contained in the brief of Appellant (Appellant's brief, p. 11) the following portion of the amendments to the General Property Tax Law is designated as being the part of the statute claimed to be unconstitutional:

> "(a) those portions of Act No. 114, Pub. Acts, 1937, and Act No. 282, Pub. Acts, 1939, which amended Section 67 of Act No. 206, Pub. Acts, 1893, by adding the following language to the court decree ordering a tax sale, to-wit:
>
> 'It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and encumbrances, of whatever kind or nature, cancelled as of such date, unless any said parcel of land shall be redeemed as provided in act number 206 of the public acts of 1893, as amended, or unless an appeal shall have been taken as provided in act number 206 of the public acts of 1893, as amended, or unless any said parcel of land shall be redeemed by any political subdivision of the state as provided in act number 206 of the public acts of 1893, as amended, for redemption by any person.' (Comp. Laws, Supp. 1940, Section 3459)."

The language above quoted is from Act No. 282 of the Public Acts of 1939 which was passed subsequent to the time that the lots involved in the present litigation were

sold at the county treasurer's sale which began in May of 1938. The decree of the Circuit Court in Chancery, ordering the sale at which the lots in the special assessment district with which we are concerned, was made under the amendment contained in Act No. 114 of the Public Acts of 1937. The changes made by the 1939 amendment do not appear to be material to the present issues, but in order that the exact language of the form of the decree in effect at the time of the 1938 tax sale may be before the Court we set forth the relevant part of Section 67 of the General Property Tax Law as amended by Act No. 114 of the Public Acts of 1937. This section containing the form of the decree is as follows (We have indicated the language added to the section by printing the additions in capital letters):

"Sec. 67. Such final decree shall be entered in the chancery record for recording decrees of such court, have the usual caption for decrees, and shall be substantially in the following form:

" 'STATE OF MICHIGAN,
The Circuit Court for the } In Chancery.
County of .....

At a session of said court held at the court house in the ..... of ..... on the ..... day of ....., A. D. 19.....

Present: Hon. .....Circuit Judge.

In the matter of the petition of ....., auditor general of the state of Michigan, for and in behalf of said state, for the sale of certain lands for taxes assessed thereon:

The said petition and the matters therein stated, and the objections filed to certain taxes therein claimed (if

any such objections are filed) came on to be heard, and proof of the due publication of the order of hearing, and of said petition having been made and filed, and after hearing all parties interested therein: It is ordered, adjudged and decreed that the amount of taxes, interest, collection fee, and charges set down in the column headed "Amount decreed against lands," in the tax record of which said petition forms a part, are valid, and decree is made in favor of the state of Michigan therefor against each parcel of said land for the amount set down in said column opposite to such parcel. It is further ordered, adjudged and decreed that said several parcels of land, or such interest therein as may be necessary to satisfy the amount herein decreed against the same, shall be severally sold as the law directs, on the ..... day of May, A.D. 19...., beginning at ten o'clock a.m. on said day, or on the day or days subsequent thereto as may be necessary to complete the sale of said lands and of each and every parcel thereof, at the office of the county treasurer, or at such convenient place as shall be selected by him at the county seat of the county of ....., state of Michigan. IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT TITLE TO EACH PARCEL OF LAND ORDERED IN THIS DECREE TO BE OFFERED FOR SALE, AND WHICH PARCEL OF LAND IS BID IN AT SUCH SALE TO THE STATE, SHALL BECOME ABSOLUTE IN THE STATE OF MICHIGAN ON THE EXPIRATION OF THE PERIOD OF REDEMPTION FROM SUCH SALE, AND ALL TAXES AND OTHER LIENS AND ENCUMBRANCES, OF WHATEVER KIND OR NATURE, EXCEPT UNPAID TAX OR ASSESSMENT LIENS OR CITY BIDS OF ANY MUNICIPALITY COLLECTING ITS OWN DELINQUENT TAXES AND ASSESSMENTS UPON LANDS FOR WHICH APPLICATION SHALL HAVE BEEN MADE TO THE STATE LAND OFFICE BOARD OR THE DIRECTOR OF CONSERVATION AS THE CASE MAY BE FOR THE WITHHOLDING OF SUCH LANDS

FROM SALE, CANCELLED AS OF SUCH DATE, UNLESS ANY SAID PARCEL OF LAND SHALL BE REDEEMED AS PROVIDED IN ACT NUMBER TWO HUNDRED SIX OF THE PUBLIC ACTS OF EIGHTEEN HUNDRED NINETY-THREE, AS AMENDED, OR UNLESS A SUIT TO QUIET TITLE SHALL HAVE BEEN FILED AND IS PENDING BEFORE SAID DATE, OR UNLESS AN APPEAL SHALL HAVE BEEN TAKEN AS PROVIDED IN ACT NUMBER TWO HUNDRED SIX OF THE PUBLIC ACTS OF EIGHTEEN HUNDRED NINETY-THREE, AS AMENDED, OR UNLESS ANY SAID PARCEL OF LAND SHALL BE REDEEMED BY ANY POLITICAL SUBDIVISION OF THE STATE AS PROVIDED IN ACT NUMBER TWO HUNDRED SIX OF THE PUBLIC ACTS OF EIGHTEEN HUNDRED NINETY-THREE, AS AMENDED, FOR REDEMPTION BY ANY PERSON. It is further adjudged and decreed that the several special orders made by this court, and entered on said tax record, are made a part hereof, with the same effect as if entered herein.

.....

Circuit Judge.

(Countersigned)

....., Clerk of Courts.'

"UPON THE ENTERING OF THE DECREE HEREINBEFORE PROVIDED FOR, ABSOLUTE TITLE TO THE LANDS THEREIN SHALL VEST IN THE STATE OF MICHIGAN AS PROVIDED IN SAID DECREE."

With the exception of the portions added by the 1937 amendment that part of Section 67 of the General Property Tax Law which we have just quoted remained the same as it had been at the time Appellant's bonds were issued in 1928, the last previous amendment to the section having been made by Act No. 262 of the Public Acts of 1899.

The effect of the 1937 amendment to Section 67 was to vest absolute title in the state of Michigan at the expiration of the period of redemption provided in Section 74 of the General Property Tax Law (1 Compiled Laws 1929, Sec. 3467) as amended by Act No. 325 of the Public Acts of 1937. Prior to the 1937 amendment the language of this section stating the period of redemption read as follows:

> "Sec. 74. Any person owning any of the lands sold as aforesaid, or any interest therein, may, at any time before the first (1st) Tuesday in May in the year following such sale, redeem any parcel of such lands, or any part or interest in such lands, by showing to the satisfaction of the county treasurer or Auditor General that he owns only that part or interest in the same which he proposes to redeem, by paying to the county treasurer or Auditor General the amount of the sale of the parcel of land, or the portion thereof wished to be redeemed, and interest thereon from the date of such sale."

By Act No. 325 of the Public Acts of 1937 the foregoing language was amended to read as follows (Changes are indicated by capital letters):

> "Sec. 74. Any person owning any of the lands sold as aforesaid, or any interest therein, may, at any time WITHIN EIGHTEEN MONTHS following such sale, redeem any parcel of such lands, or any part or interest in such lands, by showing to the satisfaction of the county treasurer or auditor general that SUCH PERSON, CITY OR POLITICAL SUBDIVISION owns only that part or interest in the same which SUCH PERSON, CITY OR POLITICAL SUBDIVISION proposes to redeem, by paying to the county treasurer or auditor general the amount of the sale of the parcel of land, or the portion thereof wished to be redeemed, and

interest thereon from the date of such sale, AT ONE PER CENT PER MONTH OR FRACTION THEREOF."

The effects of the 1937 amendments to Sections 67 and 74 were:

(1) The amendment to Section 67 vests absolute title in the state at the end of the redemption period provided in Section 74 as amended. At the time Appellant's bonds were issued the county treasurer's sale pursuant to the form of decree provided in Section 67 did not vest absolute title in the state of Michigan at the expiration of the redemption period but absolute title vested in the state of Michigan only after the land had been delinquent for taxes for any five years and had been sold and bid off to the state for the taxes of one or more of those years (Section 127 of General Property Tax Law, 1 Compiled Laws 1929, Sec. 3520). The result of the amendment was that commencing with the 1938 annual tax sale all property bid off to the state and not redeemed would become vested in the state at the end of 18 months instead of five years.

Appellant apparently does not claim that this shortening of the time is unconstitutional. It could not, however, object because the lots in question had been delinquent for more than five years at the time title became vested in the state on November 3, 1939, so that Appellant was not prejudiced by this change (R. 3, 5, 6, 12).

(2) The amendment to Section 67 expressly provides that title to each parcel of land which is bid in at such sale to the state becomes absolute in the state of Michigan at the expiration of the 18-months' period of redemption and

"all taxes and other liens and incumbrances of whatever kind or nature * * * cancelled as of such date."

The language added by the amendment was necessary (1) to make clear that absolute title vested in the state at the expiration of the redemption period instead of after five years, as formerly, and (2) to negative any possible interpretation that the county treasurer's sale to the state was subject to subsequent taxes and assessments after the expiration of the redemption period and during the remainder of the five year period, as formerly. But when absolute title became vested in the state the effect upon taxes and assessments was no different than before the amendment.

This is the amendment which, as construed by the Supreme Court of Michigan in the present case, Appellant claims impairs the obligation of its contracts by cancelling the right to reassess for deficiencies. Appellant's contention appears to be based entirely upon the decision of the Supreme Court of Michigan in *Case v. City of Saginaw*, 196 Mich. 687. We shall now examine the decision in that case to find out if it gives any support to Appellant's position.

Case v. City of Saginaw, supra, decided by the Supreme Court of Michigan on June 1, 1917, was an appeal from a decree dismissing a bill of complaint brought to enjoin the spreading of an assessment against plaintiff's land on the 1916 city tax roll. The premises in question were bid off to the state of Michigan for delinquent taxes for the years 1905 to 1910, inclusive, and on January 28, 1914, were deeded to the state by the Auditor-General and on August 18, 1914, the commissioner of the state land office

conveyed the premises to the plaintiff who brought the suit to enjoin the assessment. During the year 1911 the city of Saginaw had constructed a sewer and had levied an assessment against the property which became a lien on March 26, 1912. The assessment was divided into ten equal parts extending over a period of ten years. The land had also been assessed for a sidewalk which became a lien on November 15, 1913, and was divided into five instalments payable over a period of five years.

At the time of the transfer of the property to the state there had been returned delinquent state, county and city taxes and the 1912 instalment of the special sewer tax. The plaintiff paid the state $500.00 for the property which was divided between the state, county and city in proportion to the taxes which had been returned delinquent. It is important to note the following fact:

> "In arriving at the amount to be paid to the city, no consideration was given to installments for special taxes which were spread in 1913 and 1914, nor to those which would, under ordinary conditions, have been spread in future years to complete the payment of the improvements, making a total of $704.07" (196 Mich. 687, at 688).

In other words, in determining the share of the proceeds to be allocated to the assessment district no consideration had been given to future installments of assessments but only to the installments which had been returned delinquent when title was acquired by the state. This is an important distinction from the present case because under Section 10 of the Scavenger Act (Act No. 155 of Public Acts of 1937 as amended by Act No. 244 of Public Acts of 1939) under which the lots in the present case were sold, the proceeds will be divided in proportion to the delin-

quent taxes and special assessments cancelled and since the Supreme Court of Michigan has held that the assessment is cancelled in its entirety this would mean that the special assessment district will receive such portion of the entire proceeds as the whole assessment bears to the total amount of taxes and assessments cancelled, whereas in the situation involved in *Case v. City of Saginaw, supra,* the special assessment district only received that proportion of the proceeds which the amount of the 1912 installment of the sewer tax bore to all the taxes cancelled. Here the bondholders will receive their full proportion of the proceeds of the sale based upon the entire amount of the assessment.

In *Case v. City of Saginaw, supra,* plaintiff contended that the lien of the assessments was cancelled upon the transfer to the state, relying chiefly upon Sections 127, 130 and 131 of the General Property Tax Law. The opinion of the circuit court holding that the land could be assessed for the remaining installments of the assessment was affirmed by an equally divided court. Of the eight justices, three of them adopted the opinion of the circuit judge to the effect that only the installment returned delinquent to the Auditor-General was cancelled and the fourth affirming justice held that the lands were not liable for special assessments falling due while they were held and owned by the state but were liable for such installments as became due after the property again became subject to private ownership.

The other four justices in an opinion by Mr. Justice Ostrander held that the entire assessment was cancelled. No question of reassessment was involved but there is no reason to believe that these four justices would not also have held that any right to reassess was also cancelled. The following is Mr. Justice Ostrander's opinion in full:

> "It is, I think, illogical to say that, when the State acquires title to lands in tax proceedings, a lien for a special tax, existing when title is so acquired, remains, to be enforced whenever the State secures a purchaser for the land. After lands are deeded to the State, the supervisor is directed by the law to omit them from his roll. While they belong to the State, they are liable to no assessment, for any purpose. If any tax is charged against them in the office of the auditor general, it must be canceled. The State, then, has all the title there is, and when it sells and conveys the land, the purchaser acquires, *prima facie*, a fee. The law does not, in my opinion, contemplate a continuing lien for special taxes after the State has acquired its title" (p. 694).

Counsel for Appellant has not submitted any other authority either in the Michigan statutes or in the decisions of the Michigan Supreme Court which would justify their contentions that Appellant has a vested contract right not to have the special assessments cancelled by the acquisition of the title by the state of Michigan and a subsequent conveyance to a private owner.

An examination of Shepherd's Michigan Citations reveals that *Case v. City of Saginaw, supra,* has been cited by the Michigan Supreme Court in only one case, namely, *Auditor General v. MacKinnon Boiler and Machine Company,* 199 Mich. 489, in which the case was cited in the dissenting opinion of Justice Fellows at page 494 where he quoted the language of his own concurring opinion.

We respectfully submit that *Case v. City of Saginaw, supra,* should not be made the basis for declaring unconstitutional the important 1937 amendments to the General Property Tax Law, particularly since Section 10 of the

Scavenger Act gives Appellant its full share of the proceeds of sale. (See discussion, *supra*, p. 32, and *infra*, pp. 39-40.) The dissenting opinion of Mr. Justice Ostrander which we have quoted above is certainly more in line with the present view of the Supreme Court of Michigan as expressed in *Baker v. State Land Office Board*, *supra*, and in the present case. An opinion of a circuit judge repudiated by four of the eight justices of the supreme court is not sufficient justification for invalidating important legislation passed to meet pressing present needs.

It is, therefore, our position that the language added to the form of the decree by the 1937 amendment to Section 67 of the General Property Tax Law did not change the law but merely gave expression to existing law as to the effect of the acquisition of title by the state of Michigan.

2: *The Effect of the So-called Scavenger Act.*

The other legislation claimed to be unconstitutional is Act No. 155 of the Public Acts of 1937 as amended by Acts Nos. 29, 244 and 329 of the Public Acts of 1939, particularly Sections 9 and 10 thereof, the parts of which claimed by Appellant to be unconstitutional being quoted in Appellant's Specification of Errors as follows (Brief of Appellant, p. 12):

> "Sec. 9. * * * Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this act, free from any encumbrances, except as herein otherwise provided. * * * "

"Sec. 10. All moneys received by the state land office board, * * * shall be credited to the general fund of the state, and shall be paid to the several tax assessing units, including municipalities collecting their own delinquent taxes, in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any county treasurer or the department of conservation. Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the state of Michigan."

The Act as amended is found in most convenient form in Mason's 1940 Supplement to the Compiled Laws of Michigan of 1929, Secs. 3723-1 through Sec. 3723-14.

The Scavenger Act changed the method of disposing of lands to which the absolute title had vested in the state of Michigan pursuant to tax sales. The State Land Office Board was set up to administer the act in the southern counties of the state, including Oakland County in which is located the special assessment district involved in this case.

Section 7 provides for the so-called "Scavenger Sale" to be held each year commencing on the second Tuesday of February after the vesting of title in the state of Michigan. At this sale all such lands (except such as may be withheld at the request of municipalities) are offered for sale at public auction. No bid can be accepted for less than 25% of the assessed valuation as fixed for the year preceding the vesting of title in the state. Outsiders who are successful bidders must pay the entire purchase price

in cash within 24 hours, whereas persons who had an interest in the property at the time of the county treasurer's tax sale can buy on contract with 10% down payment with the balance payable over a ten-year period; such former owners can also meet any outside bid within 30 days after the sale in which case the outsider is refunded his money and the former owner can buy on land contract as if he had been the successful bidder at the sale.

These provisions granting special privileges to former owners were upheld by the Supreme Court of Michigan in *Baker v. State Land Office Board*, 294 Mich. 587, *supra*, on the grounds thus stated (p. 602):

> "Former owners are granted certain rights as bidders and purchasers, but the sale is of land, title to which is vested in the State; and inasmuch as the State is the absolute owner of the lands, the legislature is empowered to provide for the sale thereof in any way not prohibited by the Constitution."

We have already pointed out in this brief (*supra*, pp. 23-24) that this power of the state to dispose of its absolute property on any terms which the legislature might fix was not something new, but was a power existing when Appellant's bonds were issued. Appellant, therefore, cannot rely upon the method of disposition provided in the tax laws prior to 1937 because its bonds were subject to the power of the legislature to change this method at any time.

Section 9 of the Act provides in part as follows:

> "Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the

board under the provisions of this act, free from any encumbrances, except as herein otherwise provided" (The exception is not relevant here).

It is this quoted sentence of Section 9 which Appellant claims to be repugnant to the constitution of the United States (Appellant's brief, p. 12). To sustain this contention Appellant must establish:

(1) That the law existing at the time its bonds were issued gave a different effect to a deed from the state. The only authority apparently relied upon to establish this is *Case v. City of Saginaw, supra,* (which we have already distinguished, *supra,* pp. 31-35) construing Section 130 of the General Property Tax Law, which is still a part of the general tax law without any change whatever (1 Compiled Laws 1929, Sec. 3526). The fact that Section 130 has not been amended or repealed indicates clearly that it is not considered by the legislature to be inconsistent with Section 9 of the Scavenger Act which has been construed by the Supreme Court of Michigan in this case to pass title to a purchaser from the state free from any right to reassess the property for past improvements.

(2) Even if Appellant were able to establish that the law prior to 1937 was different, it would also have to establish that the change made by Section 9 of the Scavenger Act impaired the obligation of its contract rights. This Appellant has also failed to do. The quoted language of Section 9 merely states one of the conditions upon which the land is sold by the state, namely, that it is free from all encumbrances, including the right to reassess for past improvements. Since the state has always had the

power to sell its absolute property on any terms it might choose (see discussion above, pp. 23-24) the exercise of this power which existed long before 1928 cannot impair the obligation of Appellant's bonds.

Section 10 of the Scavenger Act, particularly that part quoted above (*supra*, p. 36), is also claimed to be in violation of the Constitution of the United States. This section provides for the distribution of the proceeds of the scavenger sale. The proceeds of any parcel sold are to be paid to the several taxing units

> "in proportion to the delinquent taxes and special assessments cancelled. * * * Such cancelled taxes and special assessments shall be deemed to include all taxes and assessments levied or becoming liens against said lands prior to the vesting of title in the state of Michigan."

The effect of Section 10 is that the special assessment district will receive such proportion of the proceeds as the *total* assessment bears to the total of all taxes and assessments cancelled.

In *Case v. City of Saginaw* (*supra*, p. 32) the district had received only that proportion which the one installment sold bore to the total of all taxes and assessments cancelled. There was room for argument there that the district should not be barred from assessing for future installments because those installments had not been taken into consideration in dividing up the proceeds of sale. But in the present situation *the assessment district will receive its full share of the proceeds of a public sale.*

It is clear, then, that Section 10, instead of being unconstitutional, in reality assures to Appellant that it will receive its fair share of the proceeds of the public sale. Even if the amendments to the General Property Tax Law and the other sections of the Scavenger Act had materially changed the law existing at the time Appellant's bonds were issued, Section 10 leaves the bondholders with a constitutionally sufficient remedy, namely: The property is sold at public auction and fairly divided between the taxing units, including the assessment district to the full extent of the assessment.

It is pure speculation to say, as Appellant does in its brief, p. 32, that because of the particular advantages given to former owners at the sale "that what the statute called an auction sale was in fact nothing of the kind because the incentive for competition was removed". This Court will certainly not set aside the statute merely because of what the colored preacher called a "floating possibility" that someone may have been deterred from bidding at the sale. The presumption of validity which upholds the constitutionality of all state legislation until the contrary is shown cannot be rebutted by nebulous conjecture.

Particularly is this true here because, under the law in effect when Appellant's bonds were issued (1 Compiled Laws 1929, Sec. 3527), the state was not required to hold a public sale but was required to sell to homesteaders at only ten cents an acre, so that the bondholders had no contract or constitutional right to have the land sold for a higher price.

3: *Appellant Had Notice of the Changes in the Statutes in Ample Time to Protect Itself by Bidding at the Sales.*

The changes in the General Property Tax Law and the enactment of the Scavenger Act took place many months before the 1938 tax sale which began in May of 1938. Appellant and the other bondholders, had they desired to protect their security, could have bid at the 1938 tax sale and thereby prevented the title from vesting in the state of Michigan 18 months later. The people of the state of Michigan have always had the right to enforce a first or preferred claim upon lands delinquent for taxes, and bondholders should have known that unless they protected themselves by bidding at the tax sale their rights would be cut off by the exercise of the paramount rights of the state (Sec. 60 General Property Tax Law, 1 Compiled Laws 1929, Sec. 3451).

See *Ingraham et al. v. Hanson*, 297 U. S. 378, for an analagous situation in which it was held that a change in the tax law did not impair the obligation of the contract of bondholders.

Appellant and the other bondholders could also have bid at the 1940 scavenger sale but they did not choose to do so. Although former owners could have met their bid the bondholders could, nevertheless, have forced the price up so that the full value would have been obtained.

Either the land in question was worth the amount of the delinquent taxes and assessments or it was not. If the

land was worth more the Appellant had ample opportunity to prevent its acquisition by the state by purchasing at the tax sale, or Appellant could have bought at the scavenger sale or forced the price up. If the land was worth less than the outstanding taxes and assessments there was obviously no point in Appellant or the other bondholders bidding at the tax sale, and a reassessment also would be useless because the excessive amount would again not be paid. It is also equally obvious that as long as the land is worth less than the assessment title will remain in the state if the state cannot sell the property free from the excessive assessment. In either alternative Appellant is not entitled to complain of changes made by the 1937 and 1939 statutes.

POINT III.

THE MICHIGAN STATUTES SHOULD NOT BE DECLARED UNCONSTITUTIONAL AS APPLIED TO APPELLANT BECAUSE IT IS DOUBTFUL WHETHER THE STATE OF MICHIGAN CAN DISPOSE OF THE LOTS IF THE PURCHASER MUST TAKE THEM SUBJECT TO THE RIGHT TO REASSESS

The Attorney General of Michigan submits the following argument under this point:

We have pointed out in the Statement of the Case, (*supra*, pp. 3-4) that the successful bidder at the scavenger sale had not executed the contract but was awaiting the outcome of this litigation. The successful bidder takes the position, and so informed the State Land Office Board, that it will not execute the land contract but will relinquish its rights under its bid in the event that the city of

Birmingham is given the right to reassess the paving tax upon the lots in question, (R. 16). The Attorney-General has also been informed that the members of the State Land Office Board apprehend that if the successful bidder did release its rights the other purchasers of lots will also rescind their agreements and title to those properties will also again become vested in the state of Michigan (R. 16).

While held by the state the lands would not be subject to special assessment even if not used for governmental purposes.

People Ex. Rel. Auditor General v. Ingalls, 238 Mich. 423.

Under the circumstances which exist it is hard to see how any benefit will be conferred upon Appellant if this Court should hold that Appellant can compel a reassessment in the hands of purchasers from the state. The decision will simply mean that the properties will remain state owned, not subject to reassessment, and Appellant will be no better off than it was before this suit was brought. The decision of the Supreme Court of Michigan below, even if erroneous as a matter of theoretical constitutional law, would not, therefore, deprive Appellant of any substantial rights.

This Court should be extremely reluctant to declare invalid important state legislation when the result would be only the justification of theoretical rights without any practical benefit to the Appellant.

The Appellees other than the state of Michigan do not join with the Attorney General in urging that this case be

disposed of on the grounds stated under Point III. Such a disposition would leave undecided the really important question as to whether the state had the constitutional power to cancel the right to reassess. As long as this question is undecided no one will be willing to purchase from the state of Michigan lands possibly subject to reassessment for past improvements and such properties will remain off the tax rolls without contributing anything to the expenses of local government. The state of Michigan is not concerned with this because since 1935 there has been no state property tax, the state's revenues having since then been raised by sales and other excise taxes. But the city of Birmingham and many other municipalities are vitally concerned that the constitutionality of the 1937 and 1939 statutes be upheld. If this Court does not now lay all doubts at rest there is sure to be subsequent litigation which will reach this Court as the only tribunal with power to decide the question conclusively.

POINT IV.

APPELLANT'S RIGHT TO REASSESSMENT IS NOT CLEAR IN ANY EVENT UNDER THE WORDING OF THE VILLAGE AND CITY CHARTERS

This Court will inquire for itself into the existence of Appellant's alleged contract rights and the nature and extent of their obligation. The most recent statement of this rule is that given in *Irving Trust Company v. Day*, No. 51 Oct. Term, 1941, decided January 5, 1942, in which it was said:

> "When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract

and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court" (86 Law. Ed. 352).

In the briefs filed with the Supreme Court of Michigan on behalf of the Appellees and by the Attorney General, intervening on behalf of the state of Michigan, arguments were presented that under a proper construction of the village and city charters the alleged right of reassessment claimed by Appellant did not exist. These arguments were not passed upon by the Supreme Court of Michigan.

The village charter provided "should any special assessment prove insufficient to pay for the improvement or work for which it is levied, and the expenses incidental thereto, the Commission may make an additional pro rata assessment to supply the deficiency" (R. 6).

Fairly interpreted this provision applies only when the amount of such special assessment proves insufficient to pay the actual cost of the improvement, or, in other words, an additional assessment may be levied only when the actual costs, including incidental expenses, exceed the estimate.

Appellant contends that an additional assessment may also be made to cover deficiencies in collections. The charter does not so provide and should not be extended by implication.

If the charter is construed as requiring a reassessment for deficiencies in collection it would not apply to a defi-

ciency arising out of the peculiar circumstances here existing. This deficiency does not arise from failure of collection in the ordinary sense, but arises only because the state in the exercise of its sovereign power has destroyed or satisfied the assessment liens. Neither the special assessment nor the collections proved insufficient; the state having acquired the land through the regular tax sale, has sold it free from special assessment liens. If Appellant is entitled to a reassessment the charter must be interpreted broadly enough to cover a deficiency whether such deficiency results by reason of any insufficiency in the original assessment or in the collection thereof through the processes provided in the charter, or through the action of the state itself in destroying or satisfying the assessment liens which were the only sources provided for the collection of the assessment. Moreover, the deficiency in this case is not the usual one where certain lots default leaving the district as a substantial unit upon which a reassessment can be levied. Here practically the whole district has failed to make any payment whatever so that substantially the whole amount of the original assessment would be reassessed on the same property. As it already appears by this general default that the land is not worth the assessment, a reassessment of the same amount on the same property would be an idle ceremony. The contingency here existing is not within the purpose intended to be covered by the charter. The provisions for the assessment should be limited to the cases where the special assessment proved insufficient either because the amount originally assessed was insufficient or because the original assessment failed of collection, always assuming that the liens for assessment continued and the remedies for their enforcement likewise continued.

The city charter provides for reassessment only "where any such assessment shall prove to be invalid in whole or in part" or "whenever for any cause, mistake or inadvertence the amount assessed shall not be sufficient" (R. 6, 7).

In the case of *State v. Vancouver*, 160 Wash. 655, under a similar charter provision the court held that the bondholders were entitled to a reassessment only when the deficiency arose from the causes therein enumerated or causes of like nature.

We agree that Appellant is entitled to all the rights and remedies given either by the village or by the city charter but it has no rights which cannot be found in either charter.

Appellant conceded that the original assessments which became due before the tax sale of 1938 are cancelled, but claims the right of reassessment as an independent right arising after the property has returned from the state to private ownership. We submit that the right of reassessment, if it is an independent right, came into existence immediately when the bonds became due and it was ascertained that the special assessment fund was then insufficient for their payment. If Appellant is now entitled to a reassessment it was equally so entitled at that time, or at any rate, not later than the sale for taxes in 1938 and if the reassessment had been made it would have been cancelled when title passed to the state. Appellant has therefore lost no rights in being now denied a reassessment which would have been cancelled if it had been made at the proper time.

CONCLUSION

For the reasons which we have given we respectfully request that the judgment of the Supreme Court of Michigan denying the Appellant its writ of mandamus to compel the reassessment against the lots in question be affirmed.

Respectfully submitted,

FERRIS D. STONE
FREDERIC S. GLOVER, JR.
HARRY ALLEN
Counsel for the Appellees
except the State of Michigan.

HERBERT J. RUSHTON,
Attorney General of the
State of Michigan,
Counsel for the State
of Michigan,
Intervening Defendant
and Appellee.

Dated February 28, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Plaintiff and Appellant,
vs.
CITY OF BIRMINGHAM,
Defendant and Appellee

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT'S ARGUMENT FOR REVERSAL

PAUL W. VOORHIES,
Counsel Amicus Curiae.

VOORHIES, LONG, RYAN & McNAIR,
Of Counsel,
2046 Penobscot Building,
Detroit, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

SUBJECT INDEX

Argument: Page

1. Impairment of contract rights is a power reserved only to the Federal Government through the grant of power to enact bankruptcy laws 4-5

2. Even though the states possess certain reserve powers to prescribe remedies for the enforcement of contract obligations, such powers must be exercised in a manner not to violate the Federal Constitution 6

3. Any device adopted by a state, the purpose and effect of which is to materially diminish the means of enforcing payment of debts, is an impairment of contract 7-10

4. The state legislation in question here, as construed by the State Supreme Court, does materially diminish the means afforded municipal creditors to enforce payment of their obligations 11-13

Cases Cited:

Arkansas S. R. v. Louisiana & A. R. Co., 218 U. S. 431 9

Bailey v. Sutch, 6 Phila. (Pa.) 408 9

Groves v. Board of Education, 109 Fed. (2) 522 9

Home Building & Loan Assn. v. Blaisdell, 290 N. S. 398 4

Long v. St. John, 126 Fla. 1 ..... 8, 9-10

State, Hall Prosecutor v. Parker, 33 N. J. L. 312 9

U. S. v. Bekins, 304 U. S. 27 5

Werthen Co. v. Kavanaugh, 295 U. S. 56 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 755

MUNICIPAL INVESTORS ASSOCIATION,
Plaintiff and Appellant,

vs.

CITY OF BIRMINGHAM,
Defendant and Appellee

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT'S ARGUMENT FOR REVERSAL

Consent of appellants and appellees to the filing of this brief has been given pursuant to Rule 27, Section 9.

Our purpose is to emphasize several reasons on which we believe the case ought to be reversed. We have no interest in the issue of bonds referred to in the pleadings in this suit, but in behalf of clients who hold bonds of many other Michigan special assessment districts, desire

to have a principle established which will prevent their virtual repudiation through withdrawal of the taxing power which supports them. The clients whom we represent have a large amount of capital in municipal bonds generally, whose value will be adversely affected if legislation such as that under consideration in this case is not held to impair contract obligations.

For the purpose of this argument, we assume that the court will hold that it has jurisdiction and that it must examine the legislation in question as it has been interpreted by the lower court, and decide whether it contravenes Article I, Section 10, of the United States Constitution.

ARGUMENT

We adopt the summary of argument contained on page 14 of appellants' brief. We advance the following points.

I. Impairment of contract rights is a power reserved only to the federal government through the grant of power to enact bankruptcy laws.

II. Even though the states possess certain reserved sovereign powers to prescribe remedies for the enforcement of contract obligations, such powers must be exercised in such manner as not to violate the federal constitution.

III. Any device adopted by a state government, the purpose and effect of which is to materially diminish the means of enforcing payment of debts, is an impairment of contract.

IV. The state legislation in question here, as construed by the Michigan Supreme Court, does materially diminish the means afforded municipal creditors to enforce payment of their obligations.

POINT I

IMPAIRMENT OF CONTRACT RIGHTS IS A POWER RESERVED ONLY TO THE FEDERAL GOVERNMENT THROUGH THE GRANT OF POWER TO ENACT BANKRUPTCY LAWS

Enough is known of the reasons which actuated the constitutional convention to incorporate Article I, Section 10, to enable us to properly interpret it. The opinions in *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, collect the various historical material which shows the conditions prevalent at the time which must have operated upon the minds of the framers of the constitution. One of the potent causes leading to disunity and conflict between the states was a practice of enacting state laws which impaired contract rights. Not only did such laws produce a condition of economic stagnation, but as they were often passed for the purpose of discrimination against creditors of neighboring states, they induced retaliatory legislation in those states, destroyed interstate commerce, and could ultimately lead to more serious conflict.

Inasmuch as the framers of the constitution did not prohibit the Congress from enacting laws impairing contract obligations, but specifically authorized it to enact bankruptcy legislation, which embraces every form of contract impairment, we must conclude that the framers of the constitution recognized that the police power residing in government might require such laws, but that the only safe agency to make them was the national government.

We now have laws passed by Congress which permit state agencies and taxing districts to invoke the bankruptcy power under such conditions as Congress deems expedient. Amendment to Bankruptcy Act, enacted August 16, 1937, 50 Stat. 751, 28 U. S. C. A., Sections 401-404,

Cf. *U. S. v. Bekins,* 304 U. S. 27. An attempt by the states to legislate taxing districts and municipalities out of their debts is nothing less than an exercise of bankruptcy powers, a field of governmental power exclusively reserved to Congress.

When we consider appeals in behalf of such legislation as is here involved, on the ground of necessity and the assertion that government must have power to provide social and economic conditions which make orderly government possible, the answer is obvious. Government does possess such power. Those who believe that debts of a certain nature have become so oppressive as to require extinction or diminution can appeal to a legislative body, where such laws can be obtained. The supreme law of the land, the federal constitution, directs that such legislation must be obtained from Congress, not from state legislatures.

It is just as incongruous to think of states possessing power to impair contracts, because the state legislature deems it necessary to exercise such power in order that government may be preserved, as to think of states exercising the power to coin money, make war or peace, etc. Judgment as to what is necessary, appropriate or desirable in all these fields of legislation is denied to them. No one would suppose that a state legislature, deeming it expedient and for the benefit of its people that it make a treaty of peace with Japan, could exercise this power. It is just as contrary to our form of government, with division of powers between the states and national government, to permit states to legislate creditors out of their rights because it is the judgment of the state law making body that its interests so require.

POINT II

EVEN THOUGH THE STATES POSSESS CERTAIN RESERVE POWERS TO PRESCRIBE REMEDIES FOR THE ENFORCEMENT OF CONTRACT OBLIGATIONS, SUCH POWERS MUST BE EXERCISED IN A MANNER NOT TO VIOLATE THE FEDERAL CONSTITUTION

It is perfectly clear, as the many cases decided in connection with Article I, Section 10, have held, that power to prescribe remedies is limited by this clause. A state may not remove all remedies, leaving nothing in their place, so that all that remains to the creditor is the naked satisfaction that the debtor ought to pay him. It cannot put so many obstacles in the way of enforcement as to make the right valueless.

Appellees contend that holders of bonds, even after this legislation, possessed a remedy. They might have bid in the property. This scarcely can be considered a right for which the creditors bargained—a right common to the whole world to attend a sale for delinquent taxes and bid on the property. The bonds were sold under an arrangement which gave the holder the right to a continued exercise of the taxing power to provide funds for their payment. When this was removed, no remedy at all was left.

POINT III

ANY DEVICE ADOPTED BY A STATE, THE PURPOSE AND EFFECT OF WHICH IS TO MATERIALLY DIMINISH THE MEANS OF ENFORCING PAYMENTS OF DEBTS, IS AN IMPAIRMENT OF CONTRACT

One would hardly expect a state legislature, intent upon violating the contract clause of the constitution, to do so in a clumsy, direct manner. Such a purpose would always be concealed as far as possible under some cloak of legitimate state action. The court, in enforcing the constitution, must look beneath the surface and refuse to be misled by the form adopted.

As this legislation is construed, an attempt is made to give it a plausible character through the operation of a deed to be given by a state agency. By reason of that, appellees contend that this is not a direct impairment of contract rights—the state is merely exercising a right of disposing of its own property, acquired through a tax foreclosure sale, on such terms as it sees fit. One of the terms which it has seen fit to include in the deed is the grant of an exemption to the property from all debt service taxes, which may be levied in the future, to meet pre-existing debts incurred in behalf of taxing districts. Appellees argue that this puts a different light upon the situation than if the state merely enacted legislation saying that land delinquent for a given number of years for taxes should henceforth be exempt from taxes to meet pre-existing debts. We submit that there is no difference. The procedure of holding an auction sale and issuing a deed or contract to the highest bidder does not permit the grant of this immunity. The state may, of course, fix the terms of payment, the price, and security exacted for deferred payments, as those matters pertain to the disposition of property owned in its proprietary capacity.

When, however, it attempts to grant an exemption to such land from future taxes of a specified character, it is acting in its governmental capacity. Action in a governmental capacity, if contrary to rights guaranteed by Article I, Section 10, must be restrained.

Although appellees' brief does not suggest it, the following question may be raised. Since states have power to define what lands may be exempt from taxes, may they not expand the grounds of exemption after bonds have been issued? We think that question must be answered in the negative, when it appears that the expansion is of such a degree that it necessarily must result in destroying the taxing power of the municipality pledged to the payment of the debt. No case in this court has directly passed upon this point, but state and lower federal courts have encountered the question and held that an extensive newly created exempt class of property remains taxable for the purpose of raising funds to discharge pre-existing public debts. The Florida constitution was amended in 1934 to provide that homesteads up to $5000.00 should be exempt from all taxation, except for special assessments. Previous to that, the only exempt property was that used for municipal, educational, literary, scientific, religious or charitable purposes. Much litigation followed this constitutional amendment to determine whether homesteads should be included in debt service levies to provide payment for bonds outstanding when the constitutional amendment was adopted. The courts in which the question was presented all held that they must be included, since the state constitutional amendment could not impair rights of bondholders to the collection of such taxes as the municipalities were entitled to levy at the time the bonds were issued. We content ourselves with citing the last of some nine decisions of the Florida Supreme Court, *Long v. St. Johns,* 126 Fla. 1, 170

So. 317, 109 A. L. R. 522, which, in turn, cites prior decisions all to the same effect, and *Groves v. Board of Education,* 109 Fed. (2) 522. These all rest on the exclusive ground that the obligations of the contract of the bondholder are impaired by subsequent state action removing homesteads as a source of taxation for bond payments. If this court should hold that this Michigan legislation does not impair contract rights, millions of dollars of outstanding Florida bonds will be jeopardized, for the Florida situation cannot be distinguished. Few Florida municipalities could meet bond obligations incurred prior to 1934 if homesteads were exempt from debt service taxes. The Florida courts would have to overrule their decisions as a result of any decision by this court that the Michigan bondholders under like circumstances have not suffered an impairment.

In two early state court cases, *State, Hall Prosecutor v. Parker,* 33 N. J. L. 312, and *Bailey v. Sutch,* 6 Phila. (Pa.) 408, the courts declined to hold that an increase in exemptions impaired bond obligations, but placed their decisions on the ground that they were so trifling as not to affect contract rights, other sources of revenue being ample to pay the bonds. In *Arkansas S. R. Co. v. Louisiana & A. R. Co.,* 218 U. S. 431, this court declined to hold that a change in exemptions operated to violate contract rights. That case was considered by the Florida Supreme Court in *Long v. St. Johns, supra,* and distinguished on grounds, which we think quite pertinent, that the complaining party was not a creditor. It had merely been voted a bonus of 5 mills on all taxable property within a parish. Furthermore, this court showed by its opinion that it recognized that cases might arise where a subsequent increase in exemptions might not be countenanced. It said:

> "An authority given by the state to promise and levy a tax for future years on the taxable property

> in the parish does not purport to limit the power to say what property shall be taxable when the time comes—at least, by general regulations not aimed at aiding an evasion of the promise it has allowed."

We think this a case where the increase in exemptions is aimed at aiding an evasion of the promise which the State of Michigan has allowed the Village of Birmingham to make. In Michigan, as in Florida, the law at the time these bonds were issued defined what real property should be exempt from taxes. Section 3395, Michigan Compiled Laws 1929, named certain classes of property which should be exempt from taxation, which roughly corresponded to the classes defined in Florida. Nothing in the classification there given could be construed to include property which had been acquired by the state and sold to private owners.

If it is decided that this Michigan legislation does not impair creditor rights, then is not every bond issued by a municipal corporation, whether a general obligation of the issuing body or a limited obligation, as these Birmingham bonds, held subject to legislative power to make sweeping extensions of areas of exempt property, thus reducing the areas subject to debt service taxes so greatly that they cannot possibly support taxes necessary to pay the bonds?

It must be recognized that in the development of municipalities, some properties will become exempt and creditors must take their chance that this may happen. The state might sell some of these lots to the national government for a postoffice, for instance, which then would not be subject to an additional levy. However, the creditor can rely, or at least ought to be able to rely, on the fact that there will be no expansion by legislation of the classes of exempt property, which will have the effect of classifying practically all the property in the district or municipality as exempt from meeting tax burdens for the payment of his bonds.

POINT IV

THE STATE LEGISLATION IN QUESTION HERE, AS CONSTRUED BY THE STATE SUPREME COURT, DOES MATERIALLY DIMINISH THE MEANS AFFORDED MUNICIPAL CREDITORS TO ENFORCE PAYMENT OF THEIR OBLIGATIONS

This case illustrates a condition typical of many others. Many bonds are outstanding whose payment can only be enforced through an exercise of power to levy additional assessments on lands in a special assessment district. The bonds carry no general obligation of a municipal corporation to pay. All that the corporation or some officer or board was obliged to do was to levy and enforce original assessments, and if those could not be collected, additional assessments. In many of these districts in Michigan, taxpayers either wilfully, or by reason of inability, failed to pay general and special taxes. These properties passed to the state, but are again in private hands or soon will be. The properties upon which the owners paid their taxes constitute but a small area in the assessment district, and if the creditor is obliged to resort to these alone, the debt cannot be paid.

Counsel for appellees, on page 14 of their brief, point to language used in *Worthen Co. v. Kavanaugh*, 295 U. S. 56, *i. e.*

> "A catalogue of the changes imposed upon the mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection, they have taken from the mortgage the quality of an acceptable investment for a rational investor."

They say that a different spirit actuated the passage of this legislation. We believe that as the statute was passed

and signed by the governor, the legislature did not intend that it should have the sweeping effect which judicial interpretation has given it, but that question is not now open. It must be regarded now as meaning what judicial interpretation says it means, and so interpreted it meets the condemnation which this court applied to the Arkansas law. It is even worse than the Arkansas legislation.

The burden upon these lands resulting from the debt created for their benefit was not the sole cause of tax delinquency. Unpaid general taxes had accumulated and were in most cases greater in amount than the assessments. The legislature probably intended to release these lands only from the accumulated liens, and give them a new start. Obviously, as soon as they went back to private owners they became liable to all general taxes which might be levied to meet governmental costs, and the existing general obligations of the municipality. The holders of the general obligation bonds then have this property as a tax source for the payment of their bonds, but the owners of the limited obligation bonds do not. Why should there be this discrimination? Are not those who furnished the funds to build water mains, sewers and sidewalks serving this particular property as much entitled to have their loans paid as those who furnished funds to build a city hall or a sewage disposal plant? If the legislature finds certain properties unable to bear their full share of governmental expense, it is decidedly unfair and oppressive to select that class of creditors who made it possible to improve the property so that it could be fit for use, and cause that class to bear the whole loss. This is not merely a measure to postpone the imposition of debt service taxes until the land can be rehabilitated; it is designed to eliminate such taxes in their entirety. It has no relationship to the purpose of correcting the cause of tax delinquency, for it

necessarily produces new delinquency. The remaining land in the assessment district, on which the owners faithfully paid their taxes, must now see their lands assessed for the deficiency caused by the newly created exempt lands. The burdens which must be imposed on them are thus made excessive, and they in turn become delinquent.

All that can be seen as a basis for this litigation, as now interpreted, is that land speculators became sufficiently powerful to have themselves put into a specially favored class, whereby they could wash out the effects of their tax delinquency and throw the burden of the cost of improving their property upon others.

CONCLUSION

Because of the foregoing, we believe that this court should conclude that the lower court erred in finding that the legislation in question is not barred by the federal constitution.

PAUL W. VOORHIES,
Counsel Amicus Curiae.

VOORHIES, LONG, RYAN & McNAIR,
Of Counsel,
2046 Penobscot Building,
Detroit, Michigan.

SUPREME COURT OF THE UNITED STATES.

No. 755.—October Term, 1941.

Municipal Investors Association, Appellant, *vs.* City of Birmingham, a Municipal Corporation, et al.	Appeal from the Supreme Court of the State of Michigan.

[April 27, 1942.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal challenges a decision of the Supreme Court of Michigan, which upheld the constitutionality of Michigan statutes[1] extinguishing unmatured special assessments, tax liens or other encumbrances on land sold for tax delinquency, and which therefore refused a writ of mandamus to compel the City of Birmingham to levy an additional special assessment on land so sold; to pay defaulted paving bonds issued in 1928 by its predecessor, the Village of Birmingham. 298 Mich. 314, 299 N. W. 90. The appellant, Municipal Investors Association, as holder of these bonds, claims to have a contract right under the law of Michigan in 1928 to require such an additional assessment, and asserts that the subsequent Michigan statutes construed to prevent the levy impair the obligation of its contract contrary to Article I, Section 10 of the United States Constitution.

Determination of this Court's jurisdiction of the appeal was postponed to the hearing of the case upon the merits. We think that the constitutionality of the two 1937 statutes upheld by the Michigan Supreme Court was sufficiently and seasonably drawn in question in appellant's reply, and that the jurisdictional requirements of § 237 of the Judicial Code (28 U. S. C. § 344) are satisfied. Appellant challenged the Acts as violative of the Contract Clause. But we find it unnecessary to consider the effect or validity of these statutes, for we think the appellant has failed to establish any contract right to an additional assessment after a sale to enforce an assessment lien under the preexisting Michigan law, in force when the bonds were issued.

The decision refusing mandamus for an additional assessment was entered on the pleadings. These disclose that the Village of

[1] Acts Nos. 114, 155, Mich. Pub. Acts of 1937.

Birmingham, in order to pay the cost of paving certain streets, took proceedings in 1928 to assess 23.4% of the cost to the village at large, and 76.6% to the property abutting the improvement, Special Assessment District No. 146. The property assessment was payable in five equal annual installments commencing with 1928. Of one hundred and ten parcels in District No. 146, about one hundred never paid their shares of the assessment, were offered for sale for these and other unpaid taxes at the annual tax sale of 1938, and were bid in by the State of Michigan. They were not redeemed, and were later sold by the State. About ten parcels in the District paid their shares of the paving assessment and have never been sold for taxes.

In anticipation of the collection of this special assessment the Village had issued in 1928 seventeen annually maturing serial 5¼% bonds. Of these No. 1 to No. 7 appear to have been paid, No. 8 to No. 11 were refunded, and No. 12 to No. 17, which are held by appellant, have all been in default both as to interest and principal at least since October 1, 1933. A negligible amount is on hand in the special assessment fund, and not over 20% of the amount still owing will be realized from the District's share in the proceeds of the tax sales. In order to replenish the fund, the appellant seeks to compel the defendants by the laws in force when the bonds were issued to levy upon all the land in the District, including the lots previously sold for taxes and the original assessment, an additional assessment equal to the unpaid principal and interest.

The general act under which the Village was incorporated listed among the permissible charter powers a provision "for assessing and reassessing the cost, or any portion thereof, of any public improvement to a special district;" Act No. 278, Public Acts of 1909, § 24(e); Mich Comp. Laws (1929) § 1786(e).[2] Pursuant to this authorization section 15 of Chapter XXI of the village charter provided: "Should any special assessment prove insufficient to pay for the improvement or work for which it was levied, and the expenses incident thereto, the Commission may make an additional pro rata assessment to supply the deficiency; and in case a larger amount shall have been collected than was necessary, the excess shall be refunded ratably to those by whom it was

[2] The same act stated that "No village shall have power: . . . To issue any bonds without creating a sinking fund for the payment of the same, except special assessment bonds which are a charge upon a special district created for the payment thereof, and serial bonds payable annually." Act No. 278, Public Acts of 1909, § 26(k); Mich. Comp. Laws (1929) § 1788(k).

paid.'"[3] Section 22 of Chapter XX of the charter stated that special assessment bonds should "be payable out of the special assessment district fund when the assessment is collected." In the bonds themselves the Village promised to pay the principal and interest, "said principal and interest however, being payable from the Special Assessment fund created for the purpose . . . The full faith and credit of the Village of Birmingham are hereby pledged for the punctual payment of the principal and interest of this bond from the special assessment fund created for the purpose, when the same shall have been collected."

The Michigan Supreme Court assumed, without deciding, that these various provisions did include in the bondholders' contract a right to additional assessments after a tax sale for the payment of deficiencies attributable to non-payment of valid prior assessments. 298 Mich. 314, 319, 299 N. W. 90, 92. As a contract must exist before it can be impaired, and as our conclusion against existence of the contract right settles this case, we feel it proper to consider only whether there was a contract between the bondholders and the Village for an additional assessment on the district property to meet deficiencies instead of undertaking the resolution of the constitutional issue presented by the challenged statutes of Michigan. While this approach forces us to decide the meaning of Michigan legislation without the assistance of the courts of that State, it is necessary to do so because of the obligation of this Court to determine for itself the basic assumptions upon which interpretations of the Federal Constitution rest.[4]

The complete charter of the Village is not before us. From the authorized power granted by the Public Act of 1909 under which it was organized, however, from the language in section 15 of Chapter XXI of the charter providing for "an additional pro rata assessment" and from the terms of the bond, limiting its payment to "the special assessment fund created for the purpose, when

[3] Section 18 of Chapter X of the charter of the City of Birmingham, adopted in 1933, makes provision for an additional assessment to meet insufficiencies in special assessments "for any cause, mistake or inadvertence." Section 12 of Chapter XVIII makes these provisions effective for the village debts where legally applicable. Obviously unless the village charter provision in effect when the bonds were issued authorized additional assessments to meet deficiencies, the city clause could not add that burden to the lots. It would be applicable only if it were a means of enforcing an existing right. Cf. In re Farm Drainage Dist. No. 1, Waupaca County, 232 Wis. 455, 460, 461, 287 N. W. 806, 809.

[4] Appleby v. City of New York, 271 U. S. 364, 379; Kersh Lake Dist. v. Johnson, 309 U. S. 485, 489-490; Hale v. State Board, 302 U. S. 95, 101.

the same shall have been collected," we are satisfied there was no contract to reassess lots once sold for the original assessment. If the stated powers of the Village to levy an assessment on improvement district property required that the lots assessed, after sale for default in their installments, should be subject to an additional assessment to cover such deficiencies, the burden might depress their value to a point where little if anything could be realized for the bondholders, and successful sale for non-payment would be frustrated. This would clearly be true where, as here, a very large proportion of the assessments were defaulted. A prospective investor in the bonds must look ultimately to the sale of each lot for the payment of the amount assessed against that particular parcel.[5]

Section 15 of the village charter authorizes an additional assessment when the original assessment proves insufficient to pay for the improvement. Assessment bonds may be based on undertakings whereby benefited lands may be liable even after they were sold to pay the assessment liens upon them to recover for defaults in sales of other assessed properties. See *Kadow* v. *Paul*, 274 U. S. 175. But in the absence of controlling Michigan law, section 15 repels such a construction. The language falls far short of subjecting lots which have been sold to pay tax or assessment liens to an additional assessment for the deficit. Such a construction would defeat the remedy of tax sales as a means of realizing the assessment lien.[6]

The opinion of the Supreme Court of Michigan does not deal specifically with the status of the lots which have not been sold to satisfy the assessments. In the absence of an assignment of error upon that ground, we express no opinion thereon.

Affirmed.

---

[5] A general lien upon lands in a district has been held to be created by suitable statutory provisions. American Securities Co. v. Forward, 220 Cal. 566, 32 P. 2d 343.

In drainage and irrigation districts the cases differ as to whether bonds with the district as obligor are the general obligations of the district or payable only from the special assessments against each parcel.

Separate obligations: Interstate Co. v. Montezuma District, 66 Colo. 219, 181 P. 123; State v. Board of Commissioners, 89 Mont. 37, 95, 276 P. 1, 18; Nelson v. Board of Com'rs., 62 Utah 218, 218 P. 952.

General obligations: American Falls Reservoir Dist. v. Thrall, 39 Idaho 105, 124, 228 P. 236, 241; Noble v. Yancey, 116 Ore. 356, 241 P. 335; State *ex rel.* Clancy, v. Columbia Irr. Dist., 121 Wash. 79, 87, 208 P. 27, 30.

[6] Courts of other states have considered similar questions. Wilcox v. Riverview Dist., 93 Colo. 115, 25 P. 2d 172; Reinhard v. City of Caldwell, 55 Idaho 342, 42 P. 2d 292; Harte v. Truckenmiller, 228 Iowa 819, 293 N. W. 568; State *ex rel.* Johnson v. Dayton, 200 Wash. 91, 93 P. 2d 909. But cf. State *ex rel.* v. Holt, 135 Mo. 533, 37 S. W. 521; In re Farm Drainage Dist. No. 1, Waupaca County, 232 Wis. 455, 287 N. W. 806 (district was promisor).